Appendix B

Decision and Order of the United States District Court for the Southern District of New York (Ward, J.)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

90 Civ. 4026 (RJW)

Sheila Ryan DeLUCA,

Petitioner,

against,

Elaine A. LORD, Superintendent of Bedford Hills Correctional Facility and Robert Abrams, Attorney General of the State of New York,

Respondents.

WARD, District Judge.

In this petition for a writ of habeas corpus, filed on June 13, 1990, petitioner Sheila Ryan DeLuca ("DeLuca") asserts that she was (1) denied effective assistance of counsel and (2) deprived of her Sixth and Fourteenth Amendment rights to present a defense by the trial court's exclusion of expert testimony. This Court initially referred the matter to Magistrate Judge Kathleen A. Roberts, who conducted an evidentiary hearing and filed a Report and Recommendation dated December 21, 1993 (the "Report"). Magistrate Judge Roberts' comprehensive and detailed Report recommends that petitioner's application for a

writ of habeas corpus be denied. Pursuant to 28 U.S.C. § 636(b)(1), petitioner filed timely objections to the Report. After conducting a de novo review, this Court grants the writ on the grounds that petitioner was denied the effective assistance of trial counsel.

BACKGROUND

I. The Uncontested Facts

On the evening of September 21, 1982, Sheila Ryan DeLuca, a recently retired New York City police officer, met friends and family at Pauline's Bar and Grill in the Bronx to celebrate her forty-second birthday and her retirement from the police force, as well as the Kingsbridge Women's Softball championship which her team had won that afternoon.[1] Because DeLuca's husband, Peter DeLuca, was not feeling well, she drove him home early. However, Mr. DeLuca insisted that his wife return to the party since she was the "guest of honor."

While DeLuca spent the night celebrating at Pauline's, Robert Bissett ("Bissett") began the evening watching a televised New York Yankee game and drinking a few beers with his friends Eugene Murphy ("Murphy") and Robert Barrett ("Barrett"). After the game, the three friends climbed into Bissett's black Ford van and drove to a bar called "Scotty's," where they drank more beer and played pool. After Scotty's closed, the three friends drove to an "after- hours club" located on East 231st Street, near Albany Crescent, arriving between 4:30 and 5:00 on the morning of September 22, 1982.

Shortly thereafter, DeLuca entered the same after-hours club with her friend, Karyn Travelina, a schoolteacher, who had been

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[1] The petitioner formally retired from the New York City Police Department six weeks before, on August 6, 1982, after fifteen years of service.

celebrating with her at Pauline's. Although the three men did not know DeLuca or Travelina, Bissett approached the two and struck up a conversation.

By 6:30 or 7:00 a.m., DeLuca and her friend, along with the three young men left the club. At some point, DeLuca got into her light blue Cadillac with the three men and spent the early morning hours driving around the Bronx. Bissett sat in the passenger seat while Murphy and Barrett rode in the back. Continuing to drink beer and wine, the four drove around for a number of hours, eventually winding up at the Bronx Park Motel where they rented a room.

At first, only Murphy and Barrett entered the motel, where they drank more beer and watched a pornographic film. Eventually, Bissett and DeLuca entered. Bissett then asked his two friends to leave so that he could be alone in the room with DeLuca. Locked outside, his friends quickly became angry and began banging on the door. In fact, Murphy became so enraged that he kicked in a window located three feet above the ground. Hearing the disturbance, the motel manager told his clerk to call the room and order the group to leave.

After that telephone call, Murphy and Barrett left the hotel on foot. Meanwhile, DeLuca and Bissett drove in her car back to Bissett's van, which was parked near the after-hours club. The two entered his van, drove for some time, and finally parked in a deserted area alongside the service road adjacent to the Major Deegan Expressway near Fordham and Landing Roads. At approximately 2:00 in the afternoon, DeLuca left the van and headed towards Fordham Road, where she called her husband.

After being out all night, DeLuca arrived home in her own car sometime around 2:30 on the afternoon of September 22nd. Her husband, who had gone out looking for his wife, drove up almost immediately afterwards. Shortly before 7:00 that evening, Mr. DeLuca, himself a retired New York City Police Captain, telephoned the 46th Precinct Detective Unit and told

the police that they would find a body in a van located behind the Dale Oldsmobile Auto Dealership. The police investigated the scene and found Bissett's dead body. He had been shot in the head four times.

DeLuca's husband again called the police sometime around 8:00 p.m. and stated that the man in the van had raped his wife at approximately 1:00 that afternoon. Mr. DeLuca told the desk sergeant that he wanted to speak to the "Rape Squad". Shortly thereafter, Sergeant Rudolph Eberhardt ("Eberhardt") of the Bronx Sex Crimes Squad called the DeLucas. After answering the telephone, Mr. DeLuca immediately handed the receiver to his wife who described her abduction and rape to the sergeant.

According to Eberhardt, DeLuca told him that, as she left the after-hours club, she was forced into a van by three men and taken to a motel near the Bronx Zoo. She stated that one of the men had subsequently forced her back into the van and taken her to the vicinity of Fordham Road and the Major Deegan Expressway where he had raped her. DeLuca also told Eberhardt that she finally managed to escape by hitting the man on the head with a bottle, which caused him to roll off of her. DeLuca stated that when she left the van, Bissett was lying in the back, bleeding. She then walked to a gas station, where she called her husband to come get her. When he failed to appear, DeLuca walked back to her car, and drove home. DeLuca then told Eberhardt that she did not wish to say anything more without her lawyer present.

The first police officers arrived at petitioner's home sometime around 8:45 p.m. While Peter DeLuca introduced himself and his wife as former officers and stated that "the bum in the truck down there raped my wife this afternoon," petitioner remained quiet. A few minutes later John Patten ("Patten"), the DeLucas' newly retained attorney, telephoned and told the officers that he did not want his clients speaking to the police prior to his

arrival.[2] No further efforts were made to interview the DeLucas after Patten's call.

Arriving at the DeLucas' home, Patten announced that he would not allow any questioning of petitioner or her husband, but asked that the rape investigation proceed. John GaNun ("GaNun"), Patten's law partner, arrived soon after and the DeLucas spent some time consulting privately with their attorneys. Following Patten's advice, DeLuca then gave the police the jeans, sneakers, sweater, and torn underpants she had been wearing the previous evening. Eberhardt noticed that the pant legs of the jeans were still damp up to a point approximately nine inches above their bottoms and that the sneakers were also damp.

The DeLucas and their counsel accompanied the police back to the 52nd Precinct where petitioner filled out a formal rape complaint, in which she claimed that three men had abducted her using a knife. After filling out her complaint, DeLuca was taken to North Central Bronx Hospital for a medical examination and returned home with a Detective Fusilli sometime after midnight.

Pursuant to an earlier agreement entered into with Patten's consent, DeLuca went to her bedroom to retrieve her guns and turn them over to the police. Peter DeLuca, who was waiting in

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[2] John Patten had never tried a murder case before being retained by DeLuca. He began his career in 1969 at the Manhattan District Attorney's Office, where he worked in the Rackets Bureau, Complaint Bureau, and Criminal Court Bureau. He prosecuted perjury, extortion, robbery, and assault cases, but never a homicide. During his time at the District Attorney's Office, he tried a total of thirty jury trials. In 1974, he left to enter private practice with Carmine Peratta, and finally, began his partnership with John GaNun in 1978, handling primarily criminal cases. At the time he tried the DeLuca case, he had tried approximately twenty-seven cases as a defense attorney.

the living room with Fusilli, reached over a nearby hutch and picked up a holstered, off-duty revolver which he gave to Fusilli. Mr. DeLuca told the detective, "This is the gun you're looking for." Detective Fusilli unloaded the .38 calibre revolver and found that it contained five spent shells. Petitioner then came out of the bedroom and produced two additional regular service revolvers which were loaded with eleven live bullets.

Ballistics tests positively established that petitioner's off-duty revolver, which contained the five spent shells, had been recently fired and was the same gun that was used to kill Bissett. Investigators searching petitioner's blue Cadillac discovered two beer bottles and a beer can. A latent fingerprint lifted from a Heineken bottle was identified as belonging to Robert Barrett. On Friday, September 24, 1982, DeLuca was arrested for the murder of Robert Bissett.

II. Defense Counsel's Pre-Trial Investigation

DeLuca first told Patten her version of the events of September 21 and 22, 1982 on the night that he was retained as her counsel.[3] After asking the police to cease their questioning of DeLuca and her husband, Patten and GaNun had a private conversation with the couple. During that meeting, DeLuca

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[3] Since this petition is at least partially premised on defense counsel's failure to evaluate both the strength of the prosecution's case as well as the possible defenses available to DeLuca, and because the test enunciated in Strickland v. Washington, 466 U.S. 668 (1984) requires an examination of the totality of the circumstances, this Court must review all the information available to Patten prior to trial.

explained the facts and circumstances surrounding the shooting of Bissett, an account she repeatedly discussed with her counsel prior to trial.[4]

A. The Petitioner's Version of Events

DeLuca testified before Magistrate Judge Roberts that at approximately 4 a.m., she and Travelina arrived at the after-hours club in her car. After entering the bar, they were approached by Bissett and his friends, who offered to buy them drinks. DeLuca and Travelina were polite but answered that they already had drinks. Bissett, Murphy, and Barrett responded by calling the two women "dykes" and "lesbians." DeLuca overheard their remarks and answered "You don't know who we are. You don't know what we're about. And I just wish you'd leave us alone and stop calling [us] names."

DeLuca then moved to the black-jack table while Travelina remained at the bar. According to petitioner's testimony, she played cards for approximately two hours. Eventually, Travelina told DeLuca that she needed to call a colleague, whom she was supposed to drive to school in the morning. Since Travelina did not want her friend to know why she was missing school that day, she decided not to make the telephone call from

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[4] At the evidentiary hearing held before Magistrate Judge Roberts on July 21, 22, 23, and 29, 1992, both Patten and GaNun testified that petitioner did indeed tell them her version of the events. They further testified that the account of rape and abduction given by DeLuca before the magistrate judge was consistent with their unrefreshed recollection of what they were told in 1982. In addition, Ellen Yaroshefsky, Toni Iovieno, and Flora Colao, all witnesses who testified at petitioner's evidentiary hearing, confirmed that DeLuca's current statements are consistent with the account they were each told at various times prior to her 1982 trial. This version of events was also recorded in the notes of Dr. Daniel Schwartz, a forensic psychiatrist with whom Patten consulted shortly after being retained by DeLuca.

the noisy bar. DeLuca and Travelina walked out of the club and petitioner offered to drive Travelina to the nearest telephone but Travelina told her that she could use the walk. The two parted company and DeLuca re-entered the club and resumed playing cards.

When DeLuca left the bar about a half hour later, she was accosted by Barrett, Murphy, and Bissett. Bissett allegedly told her, "We're going to have some fun. Get in the car and don't say anything. My friends and I are going to have a party. Just do as we say and you won't get hurt." They forced her into the driver's seat of her Cadillac. Then, pushing her seat-back forward, Barrett and Murphy climbed into the back of her car. Bissett ran around the front of the car and got in the passenger seat beside DeLuca. Once they were all in the car, either Bissett or Murphy threatened DeLuca with a knife. There was an argument among the men as to who should drive. Since she was the most sober, DeLuca offered to drive and they all agreed with her suggestion.

The three men then ordered her to drive through the Bronx, telling her "to turn at various places." During the ride, Barrett, Bissett, and Murphy began talking about various sexual exploits that they had engaged in with other women, which they referred to as "gangbangs." The men discussed going up to the country to do what they had done to another woman, including tying her to a bed "and that type of thing." DeLuca recalled Bissett asking her, "Wouldn't you like that?" From that moment on, DeLuca stated that she did not speak to them at all. Angered that she would not reply to his question, Bissett told his friends, "[t]his one is not cooperative like the others," and told her, "I'll have you know, killing is nothing to me, I've done it before." The other men just laughed. DeLuca recalled that the men smoked marijuana and snorted a white powder and it appeared to DeLuca that Bissett was in charge.

DeLuca testified that she thought she was going to be raped and killed. Escape did not seem possible. She thought about crashing her car, but could not bring herself to do it and she saw no police cars--to whom she could wave for help--while she was driving. Although she recalled stopping to buy more beer, she did not remember stopping at a paint store, nor stopping at the Bissett home. DeLuca was not aware of how long she drove; she knew only that it "seemed like forever" and that she was "completely terrorized."

DeLuca continued driving until they reached the Bronx Park Motel. While the other two men went into the room he had rented, Bissett told DeLuca, "this is what it is going to be. [The] four of us are going to go and we're going to have sex." DeLuca begged him to let her go. He said, "behave yourself, and it will be over soon ... I don't want to hear you talking above a whisper, just walk into the room and do as I say when you get in there. If you don't do as we ask, we're just going to kill you."

Hoping to isolate Bissett from the others so that she could plead her case, DeLuca told him that she was "not used to this. I'm not a hooker." She urged Bissett to get rid of Barrett and Murphy because she would be more willing to have sex with him alone. In apparent agreement, Bissett sent the other two men out of the room, telling them that he would let them in when it was their turn. Barrett and Murphy left reluctantly, telling Bissett that they did not want to stand outside for long, and that he better not keep DeLuca all to himself.

After Barrett and Murphy left, Bissett tried to take DeLuca's top off. When she pulled away, he "smashed her" in the shoulder or neck and reminded DeLuca that he had already warned her. Barrett and Murphy started pounding on the door yelling for Bissett to let them in. Murphy then kicked in the window. Shortly thereafter, the telephone rang and Bissett picked it up. After he hung up, he was "furious at everybody." Cursing uncontrollably, Bissett yelled, "bitch, all you had to do was

cooperate. You said you would if I let those other two guys out, and you went back on your promise." To Barrett and Murphy he screamed, "you fucks, you screwed it up." Visibly and verbally angry, he told DeLuca to get in the car, threatening, "if you dare cause me any more trouble you're dead." Barrett and Murphy left the motel on foot, while DeLuca and Bissett drove off in her car with DeLuca at the wheel.

Although DeLuca is not sure how long she drove with Bissett, she testified that they ended up back at Bissett's van, where he repeated his warning that she better not try anything and ordered her to get into the back of the van. She does not remember seeing a weapon, but she did testify that as she climbed in, he gave her "a good shove." Immediately, DeLuca glanced around the inside of the van and saw that there were no doors other than the two in front and the two in the very back. She also noticed that there was no door handle on the front passenger door and that the dashboard, floor, and walls were all carpeted.

Bissett climbed into the driver's seat and drove to the location near Fordham and Landing Roads. There, Bissett punched DeLuca several times, took off her clothes, and then forced her to perform oral sex on him. He then threw her down and attempted to anally rape her, but was unsuccessful. Finally, he forced her to have vaginal intercourse. "He was on top of me for a long time," she testified, "and then he just became still and didn't move." At this point, DeLuca grabbed a bottle that was in the back of the van and struck Bissett on the head, causing him to roll off of her. DeLuca quickly put on as many clothes as she could and climbed out of the front driver's side door. Petitioner testified that she did not have her gun with her and did not believe she hit Bissett hard enough to kill him.

DeLuca ran away from the van to a gas station on Broadway. There, she called her husband and asked him to pick her up. Realizing after she hung up that she had inadvertently given him

the wrong address, and afraid that Bissett might chase her, petitioner decided to walk back to her car.

DeLuca immediately headed for home but stopped when she passed Travelina driving by in her car. By this time, Travelina had learned that DeLuca had not returned home the night before and was out looking for her. They waved to each other, pulled over, and Travelina climbed into DeLuca's car. DeLuca then told Travelina that she had been raped, but pleaded with Travelina not to discuss what happened with anyone. She just felt lucky to be alive and wanted to go find her husband. When Travelina asked her why she did not kill her rapist, DeLuca told her she did not have her gun. Leaving Travelina, petitioner continued her drive home.

As she turned into her driveway, Mr. DeLuca pulled in right behind her and asked her where she had been. DeLuca apologized to her husband for giving him the wrong address. Noticing that the console of her car was twisted, he asked if everything was alright. She told him there had been a problem earlier, but that everything was alright now, an answer she claims he accepted because their "relationship was based on trust."

DeLuca testified that she initially tried to forget what happened to her. She did not want to talk about the rape and just kept thinking how lucky she was that the ordeal was over and she was still alive and walking. After getting out of her clothes and showering, DeLuca tried to take a nap. However, even though she had been awake for over twenty-four hours, she was too disturbed to fall asleep.

She decided to go into the living room where she spoke with her husband. DeLuca said she tried to appear "as normal as I possibly could be" during the conversation. When Mr. DeLuca asked her where she had been, she told him about the after-hours bar, which petitioner claims he "understood readily," since he knew she liked to play cards.

It was not until Mr. DeLuca drove their housekeeper home, however, that DeLuca began to break down. She started crying and shaking violently. While she was still alone in the house, she took another shower to calm down and relax. However, this attempt at therapy did not work and she continued to weep uncontrollably. When her husband returned, he was shocked to see his normally stoic wife "go[ing] to pieces." Mr. DeLuca immediately tried to comfort his wife and questioned her about what happened. Petitioner testified that she tried to hold back, but eventually broke down and told him about the abduction and rape. She felt nauseated and was in pain. Fearing venereal disease, she told her husband that she needed to go to the hospital. Before leaving, she went to her bedroom and got her gun because she "felt so vulnerable" and wanted protection.

Mr. DeLuca wanted to report the rape, but she told him she did not want to talk to anybody. DeLuca testified that she felt embarrassed about reporting the rape to the police, because, as a former police officer from the Bronx, she was afraid someone she knew might find out. Mr. DeLuca persisted, however, and even offered to report the incident himself if his wife could tell him where it took place. DeLuca told her husband that she did not know the names of the streets where it happened, but agreed to show him where she was raped so that he could report it.

On the way to the hospital, DeLuca directed her husband to the site of the rape. As they neared the scene, DeLuca was shocked when her husband pointed out that Bissett's van was still there. DeLuca testified that she wanted to leave, but her husband parked the car, got out, and walked towards the van, heading around a puddle toward the driver's side door. Afraid to be left alone, DeLuca followed, instinctively reverting to police procedures--drawing her pistol and going to the other side of the van. As her husband opened the front driver's side door, DeLuca opened the front passenger door and they peered into the van together, although, at first, they saw no one. Mr.

DeLuca told his wife that the van was probably stolen, but there might be fingerprints that they could use to track down her assailant.

Suddenly, her husband, who was standing on the driver's side running board, yelled, "There he is. Get out of there, you son of a bitch!" DeLuca testified that she then saw Bissett lunge from the back of the van, up and between the two front seats. He shoved Mr. DeLuca away with his left arm, knocking him off the running board and out of DeLuca's field of vision. DeLuca, who was standing in a position to protect her gun, called out "Don't move." Bissett ignored DeLuca's warning and pounced at her, yelling, "Bitch, this time you're dead. I'm going to kill you." He grabbed her left arm and started pulling her into the van. Because she was caught off balance, DeLuca testified that she feared Bissett would get her gun and kill both her husband and herself. Although she cannot recall how many shots she fired, she remembered that she shot more than once and fired as rapidly as she could at his upper body and head.

Hearing the gunfire, Mr. DeLuca ran around the van, calling out to his wife, "My God, I thought you were shot." DeLuca testified that she does not know how her husband navigated the puddle because she could not see him when he was behind the van. Seeing his wife "visibly upset" and shaking uncontrollably, Mr. DeLuca took the gun from her hand, climbed up to peer into the van, shut the passenger door, and walked her back to their car. The DeLucas immediately drove home where her husband called the police.

B. Other Evidence Available To the Defense

In preparation for trial, Patten gathered additional evidence in order to strengthen DeLuca's credibility and provide corroboration for her version of the events of September 21-22, 1982.

1. Peter DeLuca and Karyn Travelina's Testimony

Patten was aware that both Peter DeLuca and Karyn Travelina were eyewitnesses to the events petitioner described to him and both were available to verify her testimony. Mr. DeLuca, like his wife, met with Patten and GaNun immediately after the shooting and told them of his involvement in the sequence of events leading up to Bissett's death. Karyn Travelina would have been able to testify about the encounter with the three men in the after-hours club and her discussion with DeLuca when she ran into her on her way home.

Throughout the pretrial period, Mr. DeLuca expressed his desire to testify in his wife's defense. In furtherance of that desire, Mr. DeLuca provided counsel with notes summarizing his recollection of the events. A review of those notes indicates that, at trial, Mr. DeLuca could have testified about: (1) his wife's telephone calls in the early afternoon of September 22, 1982; (2) her complaint of rape later that afternoon and her fragile emotional and physical state at the time; (3) their trip to the area where the van was parked as well as their unexpected encounter with Bissett; and (4) the early evening time of the shooting, which was contrary to the prosecution's theory.

Shortly after her arrest, he was diagnosed as having cancer, and the trial date was adjourned several times because his medical condition made his ability to testify questionable. Ultimately, Mr. DeLuca had the nerve endings in his back severed, so that he would be able to testify without suffering too much pain.

2. Medical and Physical Evidence

Patten was also aware that Dr. Guidetti, the physician at North Central Bronx Hospital who examined DeLuca the night she reported the rape to the police, as well as her attending nurse, were available to testify that DeLuca was in severe pain and suffered vaginal redness and bleeding.

In addition, photographs, taken on September 24, 1982, which showed bruising on DeLuca's body were available to defense counsel. On the day the photographs were taken, DeLuca was examined by Dr. William Clyne, her family physician. Dr. Clyne signed an affidavit stating that he specifically remembered several large bruises and several smaller bruises on various areas of DeLuca's body, particularly her breasts and thighs and that he did not believe these injuries to be self-inflicted.

3. Character Evidence

Many acquaintances of petitioner made it known to Patten that they were willing to testify to DeLuca's good character and reputation in the community for truth and honesty. Among these prospective witnesses were police officials, former teachers, and members of the Franciscan religious order where DeLuca had trained.

4. Prior Similar Conduct by Bissett

To support DeLuca's claims that Bissett, Barrett, and Murphy had threatened her with tales of past "sexual exploits they had had with other women--gang bangs," both Patten and DeLuca investigated Bissett's past.[5] That investigation led them to a woman named Elizabeth Kochovos ("Kochovos") who told them she would be willing to testify at petitioner's trial.

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[5] According to DeLuca, Bissett and his companions described having taken another woman "up to the country," where she was tied to a bed and raped. Bissett also threatened to kill DeLuca if she was not cooperative, saying that "killing is nothing to me, I've done it before."

After reading of Bissett's death, Kochovos called her local precinct to report that, two years earlier, Bissett had abducted and attempted to assault her. Kochovos explained that she did not pursue her claim against Bissett, because his mother, Helen Bissett, called Kochovos's mother and pleaded with her not to press charges.[6] The defense learned of this report, and later obtained a statement from Kochovos. In her statement, Ms. Kochovos described how Bissett became enraged and would not let her leave his car. According to Kochovos, Bissett beat her, tore her shirt and underwear, and threatened to take her "to visit some friends."

5. Rape Trauma Syndrome Evidence

Concerned with his client's apparent lack of an immediate outcry, Patten also sought out evidence on Rape Trauma Syndrome, the symptoms exhibited by victims following a rape. During this search, he was put in contact with Flora Colao, an expert in the field and founder of the St. Vincent's Hospital Rape Crisis Center. In preparation for trial, DeLuca met with Colao on several occasions. Colao was expected to testify at trial that rape victims often do not "cry out" to the first person they see following a rape, and initially try to resume their normal activities with no mention of the assault.

6. Evidence Concerning DeLuca's Sexual Orientation

Finally, petitioner stated at the hearing before Magistrate Judge Roberts that she was a homosexual and did not have a traditional sexual relationship with her husband. Although Patten does not recall being told this by DeLuca, he does remember having explicit discussions with her about her sexuality. Patten testified that he was aware that DeLuca was not interested in "traditional" heterosexual relations with men

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[6] When cross-examining Helen Bissett at trial, Patten established that she had, in fact, contacted Kochovos' mother. However, he never developed this line of questioning beyond Mrs. Bissett's initial contact.

and that her only intimate heterosexual contact had occurred when she was abused by an older man when she was eight or nine years old. He also believed that his client's marriage to Peter DeLuca was more akin to a father/daughter relationship, and characterized it in those terms when speaking to Dr. Daniel Schwartz concerning petitioner.[7]

III. The Evidence Presented At Trial

A. The Prosecution's Case

The State's case at trial was built entirely on circumstantial evidence. Largely through the testimony of Murphy and Barrett, as well as the testimony of the after-hours club's blackjack dealer, Bissett's mother, the Bronx Park Motel's clerk and manager, a paint store owner, and the police officers and city officials investigating this case, the prosecution attempted to portray DeLuca as a loose woman, who had gone on a "partying spree," had "hit on" Bissett, and after satisfying her sexual desires, had murdered him in cold blood. As the prosecutor put it in his closing argument:

> Strange combination, isn't it? Bissett and Sheila Ryan DeLuca--42 year old married woman, 28 year old single man. A probationary fireman who had three months to go until he became full fledged as a fireman in the New York City Fire Department as opposed to the fifteen year veteran cop who had left her husband when he went home after the bar and she went out for more fun and more partying. She got what she wanted. What did

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[7] Patten consulted Dr. Schwartz, a forensic psychiatrist, in preparation for trial. The notes taken by Dr. Schwartz during that meeting reveal that DeLuca had described herself to Patten as "asexual" and considered heterosexual relations "dirty."

> Bissett want with a 42 year old heavyset blonde woman when he's got his girlfriend? What does she want with a 28 year old good-looking fireman? I leave that to you to consider.

Both Barrett, a 22 year-old part-time housepainter, and Murphy, a New York City Emergency Medical Services Paramedic, testified that they spent the night of September 22 with their friend Robert Bissett. They both stated that DeLuca and Travelina entered the after-hours club shortly after they had arrived there in the early morning hours of September 22. Although neither Barrett nor Murphy knew DeLuca or Travelina, Bissett struck up a conversation with them and spoke with DeLuca at the club's blackjack table, while Barrett and Murphy continued to talk at the bar.

According to the testimony of Barrett, Murphy, and Michael Belloise ("Belloise"), the club's blackjack dealer, the group left the after-hours club together at approximately 6:30 a.m. As petitioner was walking out, Belloise noticed that Travelina seemed upset and heard DeLuca tell one of the three men, "that he shouldn't have called her girlfriend a dyke." The young men laughed it off and then exited.

When they emerged from the after-hours club, Barrett and Murphy testified, they walked directly across the street to Bissett's van, while he remained behind to speak to the women. After a few minutes, Bissett crossed to the van and let his friends in, telling them to wait there until he returned. Bissett then climbed into the back of DeLuca's blue Cadillac and drove away with the two women.

Although neither Barrett nor Murphy made any mention of DeLuca re-entering the club once the group had left, according to Belloise and Robert Safian, the club owner, DeLuca returned within five or ten minutes of leaving the bar to use the ladies room. When she came out of the bathroom, she stopped at

Belloise's blackjack table where Arthur Fuhst and a customer named Diane were still playing. After either Fuhst or Diane said something to petitioner, Belloise testified that he heard her say, "I'm an ex-cop and these guys better not fuck with me because I'll kill them."[8] Petitioner then went back outside.

According to Barrett and Murphy's testimony, DeLuca and Bissett returned approximately twenty minutes to a half-hour later without Travelina. DeLuca pulled her Cadillac alongside the van and Bissett, who was now in the front passenger seat, told Barrett and Murphy to get into the car. For about fifteen minutes, the four just sat there parked by the van, passing around some "sparkling wine" which DeLuca and Bissett had been drinking.

Leaving the van parked by the after-hours club, DeLuca and the three men began driving around. Barrett and Murphy claimed that petitioner and Bissett "seemed to sort of hit it off," and they were "sort of left out of the conversation." As they were being driven around, both Barrett and Murphy dozed off. At one point, Barrett awoke and Bissett gave him money to buy beer in a superette on Fordham Road.

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[8] Testifying before the grand jury only three weeks after the incident, Belloise reported the statement somewhat differently. At that time, Belloise did not mention DeLuca saying anything about killing anyone. Instead, he told the grand jury, "After she used the bathroom she came out and she said to nobody in particular--I don't know if anyone knew her--in general she just said that she was an ex-cop and the guys outside better not fuck with her because she wouldn't take any shit from them and she might get them back or something." In addition, Belloise made no reference to DeLuca's alleged statement when he was questioned by police immediately after the killing. Belloise attempted to explain the discrepancy on re-direct examination, stating that, before the grand jury, he had used his own words but at trial, he wanted to use the actual words he remembered her saying.

At 8:30 a.m., Helen Bissett testified, she was awakened when she heard her son and a woman enter the house. Mrs. Bissett testified that she could not see them, but heard them speaking softly in the entrance foyer. When Bissett came into his mother's bedroom, she asked him who the unseen visitor was. Her son told her that the woman had to go to the bathroom and that he was then going to take her home. Before leaving, Bissett asked his mother for some money to buy paint, and she gave her son a blank check. Bissett then kissed his mother goodbye and left the house.[9]

According to the testimony of William Lipton, the owner of the Blue Store, Bissett stopped by the store sometime between 7:00 and 9:00 on the morning of September 22. Bissett cashed the blank check his mother had given him and used some of the money to pay for an outstanding bill. During the transaction, Bissett had a brief "friendly" chat with Lipton, and, according to Lipton, did not appear to be drunk or "high."[10]

Barrett and Murphy testified that the group continued to drive around the Bronx while drinking more beer and smoking marijuana until they reached the Bronx Park Motel, located on Fordham Road and Crotona Avenue. Bissett told the motel clerk that he needed a room with a waterbed for a "short stay" and asked for an x-rated movie. When asked to pay, the hotel clerk testified, Bissett flashed his fireman's badge. At first, only Barrett and Murphy went into the hotel room. They testified

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[9] Neither Murphy nor Barrett testified that they had stopped at Bissett's house. Under the prosecutor's theory, they had presumably "dozed off" during this rest stop. However, Patten did not pursue this question on cross-examination.

[10] Again, as was the case with the stop at Bissett's home, neither Barrett nor Murphy made any mention in their testimony of a visit to the Blue Store, nor did Patten pursue this discrepancy in his questioning of them.

that they started to watch the porn film and continued to drink beer.

After approximately fifteen or twenty minutes, Bissett came to the door and asked the other two men to leave the room. Barrett and Murphy immediately picked up their beer and left. Claiming that they became bored and angry because they wanted to go home and were left standing in the parking lot, Murphy and Barrett testified that they began to bang on the door, yelling "let's go" to Bissett. Then Murphy kicked in the window. When Bissett came to the window, looking a "little angry," the two took their beer and left on foot. Neither Barrett nor Murphy had ever seen DeLuca with a gun during the time they were with her that morning.

Both the motel clerk and manager verified that Bissett had rented the room at 10:00 a.m., and that there was a disturbance about a half hour later. The motel manager, who had observed Murphy kicking in the room's window, ordered his clerk to call the room and tell its occupants to leave, or he would call the police. The motel clerk called Bissett and told him to come to the office for a refund. In response to this call, DeLuca and Bissett left the motel room and got into her car. Although the motel clerk had taken the refund money from the drawer, Bissett never returned to claim it.

Sometime between 1:00 and 1:30 p.m., a team of workers from the New York City Department of Water Supply arrived at the service road adjacent to the Major Deegan Expressway. One of their trucks descended a "ramp" into a gully-like, relatively desolate area. Near the bottom of the ramp, about twenty-five feet away from where they parked the truck, the workers saw Bissett's van and noticed that it was moving around and bouncing up and down. On the van's door was a sign that read, "Don't laugh, your daughter might be in here" and the crew joked that, "somebody was getting laid in the van." Stanley Berman, one of the workers, testified that the front of the van was up on a

two-inch curb. Both doors were closed. Berman stated that the van was surrounded by a large puddle of water.

A Department of Sanitation front-end loader was also in the area of the van between 1:30 and 2:00 that afternoon. Basil Meola, the operator of the front- end loader, testified that he saw Bissett's van parked "half in and half out" of a large puddle of water. Meola noticed that both front doors were closed, but that the back window was slightly open. Like the water supply workers, he noticed that the van was bouncing up and down.

At about 2:00 p.m., one of the water department workers, who was still sitting in his truck, looked up and briefly noticed a tired looking woman matching DeLuca's appearance (heavyset with dark blond hair) stumbling up the ramp. The woman staggered past the two other crew members who had gone to the top of the ramp to do some work. Neither the water department workers, nor Meola heard any gunshots. In addition, none of the water department employees who saw the woman leave noticed a gun in her hands.[11] At trial, the workers were unable to identify the woman as DeLuca.

Ann O'Byrne ("O'Byrne"), an exchange student from Ireland who spent the summer of 1982 in the United States, testified that she worked one day a week as a house cleaner for the DeLucas. On the morning of September 22, O'Byrne met Travelina at

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[11] The prosecution theorized that the workers were unable to hear the gunshots as a result of the high level of noise in the area. The Department of Sanitation's front-end loader's diesel engine was quite noisy. Despite the fact that the water supply truck was closer to the van than it was to the front end loader and that the workers were able to hear each others conversation, the prosecution argued that, combined with the nearby highway truck traffic, the fairly high level of noise in the immediate area drowned out the sound of gunfire. In addition, the prosecution pointed out that the gunshots would have been muffled by the carpeting in the van.

Pauline's where she reluctantly accepted Travelina's offer to drive her to the DeLuca home, even though Travelina appeared drunk.

When the two arrived, Mr. DeLuca told O'Byrne that his wife was not yet awake. After Travelina left, Mr. DeLuca confided in O'Byrne that his wife had not yet returned home from the night before. Sometime around 1:00 p.m., the telephone rang. When Mr. DeLuca answered it, O'Byrne heard him say, "What's wrong with you now?" O'Byrne did not listen to the rest of Mr. DeLuca's conversation, but when he hung up he told her that "he was going out looking for Sheila."

At approximately 1:30 p.m., O'Byrne received a telephone call from Mr. DeLuca "to see [whether] Sheila [had] called or come home yet." O'Byrne informed him that she had not heard from her, to which Mr. DeLuca replied, "If she calls or comes home, tell her I'm on my way back." He arrived home five minutes later and told O'Byrne that he'd been "everywhere looking for Sheila, down by 207th Street by the Mobil gas station." Mr. DeLuca again drove off in search of his wife.

O'Byrne saw DeLuca pull into the driveway in her car sometime around 2:20 p.m. Almost immediately thereafter, Mr. DeLuca pulled up in his tan Ford. O'Byrne noticed that "[t]hey stayed talking in the garden for a few minutes." Then petitioner entered the house alone and immediately went to her bedroom where she undressed and put on a bathrobe.

After getting out of her clothes, DeLuca emerged from her bedroom and told O'Byrne to go downstairs and clean the basement. From the basement, O'Byrne heard the DeLucas, who were in the living room above, speaking in high-pitched tones. After finishing her cleaning around 3:45, O'Byrne returned to the living room, where she sat between the DeLucas on the couch and drank coffee. O'Byrne noticed that Mr. DeLuca "wasn't his usual self at all" and that he "didn't say much." She also noticed that he was still wearing the same clothing that he

had worn earlier in the afternoon, and that there were no water or mud stains on his pant legs.

They all spoke briefly about gambling in Atlantic City, where O'Byrne was planning to go with her aunt that Friday. After suggesting that his wife take a look at an article he had been reading about "an after hours gambling place," Mr. DeLuca drove O'Byrne home sometime around 4:30 p.m.

The police officers who investigated the case testified to receiving a series of calls from Mr. DeLuca between 7:00 and 8:00 p.m., in which Mr. DeLuca reported the body left in the van and Mrs. DeLuca's rape. Sgt. Eberhardt recounted the account of rape that petitioner had conveyed to him that night.

The officers who first arrived at the crime scene testified that they found Bissett's van still parked in a pool of water, where it had been observed earlier in the day by the Water Supply crew. The driver's side door was open and the windows of both doors were down. Looking inside the van, the police found Bissett's fully clothed body, slumped face down between the two front seats, appearing as if he had been coming from the rear of the van when he was killed. According to the police report, blood was found "splattered in the front area of the van." Two partially deformed bullets were recovered from the interior of the van, one in the rear section and the other under Bissett's head. Ballistics tests, entered into evidence, established that the bullets had come from DeLuca's off-duty revolver. Three bottles of Riunite wine were also recovered from the back of the van.

Dr. Beverly Leffers, Deputy Chief Medical Examiner, testified that the autopsy she performed on Bissett revealed four close "in and out" bullet wounds, caused by four separate bullets. Each entry wound was on the right side of the head. One bullet had entered "towards the front of the head between the eye and the ear" and "traveled leftwards and backwards and exited from the back of the head." The other three bullets entered above and behind Bissett's right ear, traveled straight

across his head, and exited near his left ear. She also testified that gunpowder was found in Bissett's wounds, indicating that the shots were fired from a distance of twelve to eighteen inches. Evidence of cocaine use was also discovered in Bissett's body.

Finally, Dr. Leffers confirmed that a "very small bruise was found on the back of Bissett's head, consistent with his being struck with a bottle." Unfortunately, the precise time of his death could not be determined because Bissett's body had been refrigerated to prevent decomposition and this altered the progression of signs that appear after death.

Dr. Robert Shaler, the Director of Serology for the Medical Examiner's Office, testified that serology tests he performed revealed that Bissett had engaged in both vaginal and oral sex some time before his death. Tests on DeLuca's torn underpants showed that they contained seminal fluid from a man with type O blood, Bissett's blood type.

B. The Defense Case

At the close of the State's case, defense counsel unsuccessfully sought to call Flora Colao, petitioner's expert witness on rape trauma syndrome. Patten wanted Colao to testify in order to rebut the prosecution's theory that DeLuca fabricated her rape claim in order to hide her guilt. However, Justice Lawrence Tonetti, the trial judge, denied the request.

Confident that the prosecution was wrong about the time the shooting occurred,[12] and that the State had not completely

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[12] While it is obvious from their testimony that both Patten and GaNun found the fact that the prosecution was "wrong" about the time of the shooting significant, this Court is at a loss to understand why they believed it would be equally significant to the jury. The attorneys knew from their conversations with their clients that the shooting actually took place in the evening. However, since the jurors were not privy to this information and no

(continued...)

refuted the possibility that Peter DeLuca had killed Bissett,[13] the defense rested, presenting no evidence to the jury.

On April 18, 1984, the jury found petitioner guilty of Murder in the Second Degree, in violation of N.Y. Penal Law s 125.25(1). DeLuca is currently incarcerated at Bedford Hills Correctional Facility, serving a sentence of twenty years to life. Peter DeLuca died shortly after his wife was sentenced.

IV. Post-Conviction Proceedings

On May 15, 1984, petitioner moved to set aside her verdict pursuant to N.Y.Crim.Proc.L. § 330.30. The motion was denied on May 18, 1984, and petitioner was sentenced as set forth above. Petitioner's conviction was affirmed by the Appellate Division without opinion on April 11, 1985. People v. DeLuca, 488 N.Y.S.2d 529 (1st Dep't 1985). Subsequently, DeLuca's application for leave to appeal to the Court of Appeals was denied. People v. DeLuca, 65 N.Y.2d 978 (1985) and certiorari was denied on February 24, 1986. DeLuca v. New York, 475 U.S. 1012 (1986).

On May 3, 1989, DeLuca moved to vacate her conviction pursuant to N.Y.Crim.Proc.L. § 440.10, raising, for the first time, a claim of ineffective assistance of trial counsel, and publicly admitting, for the first time, that it was she who shot

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[12](...continued)
evidence was presented by the defense establishing the "real" time of the shooting, the jury had no reason to question the time hypothesized by the prosecution, let alone find that their "mistake" was significant.

[13] No evidence was presented at trial implicating Mr. DeLuca in the shooting of Bissett. Patten's confidence rested solely on the fact that, as her husband, Mr. DeLuca had access to petitioner's gun and likewise had a motive to kill his wife's rapist. However, the State had shown that nobody fitting Mr. DeLuca's description was seen near the van at the time that they theorized the shooting took place.

and killed Bissett. The § 440 motion was denied on August 24, 1989. On December 12, 1989, the Appellate Division, First Department, denied petitioner's application for leave to appeal the denial of her § 440 motion.

On June 13, 1990, DeLuca filed this petition for a writ of habeas corpus. Petitioner claimed, as she did in her § 440 motion, that she had been denied effective assistance of counsel by various errors of her trial attorney which deprived her of the right to make critical decisions in her case, including the decision whether to testify and present her account of rape to the jury. DeLuca also argued that the trial court's refusal to allow the rape trauma syndrome expert to testify had deprived her of her right to present a defense.

This Court referred the matter to Magistrate Judge Roberts on January 24, 1991 and an evidentiary hearing was held on July 21, 22, 23 and 29, 1992. As noted above, on December 21, 1993, Magistrate Judge Roberts issued her Report recommending that the petition be denied. The Report found that the performance of petitioner's counsel had not been constitutionally deficient, and that the refusal to allow rape trauma syndrome evidence had not deprived petitioner of any constitutional rights.

Petitioner has filed objections with the Court, in which she argues that the magistrate judge's factual findings overlooked critical portions of the record and that her legal recommendations are not supported by the facts in this case or the law. She urges that the petition be granted and that this Court order a new trial.

DISCUSSION

I. Standards for Reviewing a Magistrate Judge's Report and Recommendation

When timely objection has been made to a portion or portions of a magistrate judge's report, the district judge must "make a de novo determination ... of any portion of the magistrate's disposition to which specific written objection has been made." Rule 72(b), Fed.R.Civ.P. See also, 28 U.S.C. § 636(b)(1). In addition, 28 U.S.C. § 636(b)(1) affords the district court broad latitude in considering a magistrate judge's recommendation, even if no party objects to it. Grassia v. Scully, 892 F.2d 16, 19 (2d Cir.1989). The judge may then accept, reject, or modify, in whole or in part, the magistrate judge's proposed findings and recommendations.

However, the district court's obligation to make a de novo determination of properly contested portions of a magistrate judge's report does not require the judge to conduct a de novo hearing on the matter. United States v. Raddatz, 447 U.S. 667, 676 (1980). It is sufficient that the district court "arrive at its own, independent conclusion about those portions of the [magistrate judge's] report to which objection is made." Hernandez v. Estelle, 711 F.2d 619, 620 (5th Cir.1983).

II. Ineffective Assistance of Counsel

In Strickland v. Washington, 466 U.S. 668, 689 (1984), the Supreme Court established a two pronged test for analyzing ineffective assistance of counsel claims. First, petitioner must show that her counsel's conduct was objectively unreasonable. Second, she must demonstrate that her counsel's deficient performance prejudiced her defense. In other words, she must prove that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. This is no light burden.

In order to prevail on her claim, DeLuca must overcome the "strong presumption that [her] counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689.

Lest reviewing courts inflexibly apply this standard, the Supreme Court emphasized that the goal of the effective assistance guarantee of the Sixth Amendment is to ensure fundamental fairness.

> Most important, in adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules. Although those principles should guide the process of decision, the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.

Id. at 696.

Recognizing that "[t]here are countless ways to provide effective assistance in any given case," the Supreme Court did not attempt to specifically define the types of professional conduct that constitute "adequate assistance." Id. at 689. Rather, Strickland instructs examining courts to judge each claim individually by looking to the legal profession's "prevailing norms of practice" in order to determine whether, under the particular circumstances present, the attorney's actions constitute reasonable assistance.

This does not mean that Strickland gives no explicit guidance. Some duties, the Court noted, are so basic as to be obvious. For instance, all counsel representing criminal defendants have a "duty to advocate the[ir] defendant's cause and the more

particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution." Id. at 688.

It must be remembered, however, that, regardless of the behavior of counsel, the focus of any reviewing court's analysis must be on the fairness of the trial itself. It is not "the purpose of the effective assistance guarantee of the Sixth Amendment ... to improve the quality of legal representation, although that is a goal of considerable importance to the legal system.... The object of an ineffectiveness claim is not to grade counsel's performance." Id. at 689.

Thus, even if counsel's behavior manifests a total lack of concern for his client and clearly falls far below acceptable professional norms, his client's ineffectiveness claim will fail if she suffered no prejudice from her attorney's behavior. In fact, under Strickland, the reviewing court need not even consider counsel's behavior, if it first determines that no prejudice was suffered by the defendant. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." Id. at 697.

By the same token, even if the most well-intentioned lawyer earnestly pursues a strategy that he believes to be in the best interest of his client, an ineffective assistance of counsel claim will lie if that strategy is objectively unreasonable under professional norms, and as a result, his client suffers prejudice. Such was the case in John Patten's representation of Sheila Ryan DeLuca during her murder trial in the Supreme Court of New York, Bronx County.

It is clear from his testimony at the evidentiary hearing that Patten believed and continues to believe in DeLuca's innocence. Driven by that belief, the record reveals that he zealously attempted to secure his client's acquittal. However, when representing a client, zeal can prove to be a liability if it eclipses

the concerns and wishes of the defendant and leads to the stubborn pursuit of an objectively unreasonable strategy. If the pursuit of the objectively unreasonable strategy leads counsel to breach his duty to make a "thorough investigation of [the] law and facts relevant to plausible options," and to inform and consult with his client about important decisions, then counsel has failed to render effective assistance. Id. at 690-91.

According to Patten's testimony, he believed that there were two possible defense theories from the very beginning. First, he could argue that the State failed to prove its case beyond a reasonable doubt. Second, he could claim that DeLuca acted in self-defense. Ultimately, he decided to pursue the former strategy. In so doing, Patten seriously overestimated the effectiveness of the reasonable doubt defense, and likewise, grossly underestimated the strength of the State's case against his client. As a result, the jury was given no theory--other than the State's--to consider in evaluating the strong circumstantial evidence implicating DeLuca.[14]

DeLuca contends in this habeas petition that her counsel's erroneous reliance on the strength of his "whodunit" defense deprived her of her right to present a "factually compelling, and legally viable defense that likely would have resulted in an outright acquittal or, at worst, a manslaughter conviction." Specifically, she argues that Patten failed to explain the possibility of pursuing an extreme emotional disturbance ("EED") defense, and likewise, failed to advise her that she had the

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[14] Judge Tonetti summed up the power of the prosecution's theory during a discussion on the admissibility of Flora Colao's testimony.

> That this defendant had access to the deceased, was last seen with the deceased, left the vicinity of the deceased prior to his demise, and that her gun killed him. That's the theory of the prosecution.

ultimate right to decide whether or not she would testify on her own behalf.

This Court is well aware that it must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690. Mindful that it must make every effort to eliminate the distorting effects of hindsight, this Court nonetheless finds that counsel's failure to adequately consider and inform his client of an important defense option in the face of the prosecution's damning evidence resulted in a "breakdown in the adversarial process that our system counts on to produce just results." Id. at 696. It is not hindsight that allows this Court to conclude that Patten's failure to understand the significance of the EED defense was tantamount to deficient assistance, it is common sense.

A. Extreme Emotional Disturbance[15]

At the hearing before Magistrate Judge Roberts, Patten testified that, although he could not recall her reaction to the suggestion, he had discussed the EED defense with DeLuca. He was certain of this fact because in order to discuss the murder charge she faced, he had to read New York State's murder statute. Since the EED defense is listed in the statute under

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[15] The EED defense is available to an individual whose mental state does not rise to the level of "insanity," but who "is exposed to an extremely unusual and overwhelming stress," and "has an extreme emotional reaction to it as a result of which there is a loss of self-control and reason is overborne by intense feelings, such as passion, anger, distress, grief, excessive agitation, or other similar emotions." People v. Shelton, 385 N.Y.S.2d 708, 717 (1976). Unlike the older "heat of passion" defense, the EED defense does not require the defendant to act spontaneously and immediately after exposure to the stress or trauma. Thus, a "cooling off" period is not fatal to an EED defense. See People v. Patterson, 39 N.Y.2d 288, 302-03 (1976).

Subdivision 1, he had to tell her it existed. While sure that they discussed the EED defense, Patten stated "[w]hether she understood me or not, I don't know." When asked by Magistrate Judge Roberts what ultimately caused him to abandon this defense option, Patten answered that it was because DeLuca had an "absolute aversion to meeting with psychiatrists."

According to DeLuca's testimony, Patten discussed a possible insanity defense which he referred to as "EEP" or "EDP."[16] Patten illustrated how this potential defense would work by recounting the story of a police officer who had shot a young boy. He told DeLuca that the officer successfully asserted the defense and as a result, he was institutionalized for less than a year. Since petitioner did not consider herself to be "crazy," she told Patten that she would not consent to any type of insanity defense. In her view, there was no way "that anyone could deem me insane."

In her Report, Magistrate Judge Roberts resolved this apparent conflict between the accounts of Patten and DeLuca by crediting Patten's testimony and rejecting DeLuca's assertion that she was not informed of the EED defense, as she now understands it, prior to trial. The Report concluded that Patten did not pursue the EED defense because "the successful assertion of the [EED] defense is difficult, if not impossible, without [psychiatric evidence] and petitioner refused to meet with a psychiatrist."

After reviewing the entire record de novo, this Court agrees with petitioner's assertion that the Report's findings are contrary to the weight of the evidence presented. Although this Court believes that Patten made some reference to the EED defense in his early discussions with his client, it is not convinced that he adequately explained the option to DeLuca, nor is it persuaded

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[16] Petitioner thought she remembered Patten calling it the "EDP" defense because she recognized that terminology as police shorthand for emotionally disturbed person.

that he, himself, completely understood the defense. Furthermore, the Court does not accept Patten's purported rationale for failing to pursue the option of an EED defense, especially when the facts of this case so obviously demanded it.

Much of the testimony at the hearing suggests that Patten never fully comprehended the usefulness of the EED defense. When asked by the magistrate judge whether it was he or DeLuca that had ultimately made the decision not to pursue an EED defense, Patten replied, "I don't believe we ever decided to present it at all, Judge. We were going with the--either no defense, or the defense of justification."

After initially discussing the possible defenses with DeLuca, Patten testified that he consulted with Dr. Daniel Schwartz, a psychiatrist, "to explore what was the state of [DeLuca's] mind at the moment that trigger was pulled." Presumably, it was with Dr. Schwartz that Patten explored the psychiatric defenses available to DeLuca. However, the notes Dr. Schwartz took during his consultation with Patten make no mention of an EED defense. Rather, they focus once again on what Patten appears to have determined were the only viable defenses. Page five of Dr. Patten's notes state:

2 possible defenses:

1) no proof beyond a reasonable doubt

2) self-defense

On the final page of his notes, Dr. Schwartz wrote "psychiatric issue--would it be unreasonable for her to believe he was lunging at her and she had to defend herself." This documentary evidence strongly suggests that Patten was not actively investigating the EED defense at the time he consulted with Dr. Schwartz and seriously undermines the Report's finding that Patten's only reason for deciding not to pursue the EED defense was that DeLuca refused to meet with Dr. Schwartz.

In addition, DeLuca's version of events is buttressed by the testimony of other witnesses at the hearing who were privy to

attorney-client conversations between Patten and DeLuca. Frank GaNun, Patten's law partner, testified that after hearing DeLuca's account of the rape and shooting, he and Patten had several discussions about potential defenses.[17] However, GaNun had no recollection of any discussions concerning an EED defense and he testified that he did not believe that he was ever a participant in such discussions.

Nor did Ellen Yaroshefsky, a lawyer specializing in battered women's self- defense cases, who met with Patten and petitioner in late 1982 or early 1983 to discuss possible defense strategies. Yaroshefsky testified that the EED defense was never mentioned during that meeting. Flora Colao, who had met with Patten several times prior to trial, both with and without DeLuca present, testified that Patten never discussed the EED defense strategy. If he had, she was certain that she would have recognized it since the EED defense had been used in a case on which she had recently consulted.

Of course, none of this testimony, on its own, is dispositive in determining whether or not Patten fulfilled his duty "to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution," or his duty to make a "thorough investiga-

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[17] Like Patten, GaNun was attracted to the justification defense and the two considered whether they should present a case of self-defense, using DeLuca's testimony as support. GaNun remembered that he and Patten had no concerns about DeLuca's credibility. According to GaNun, DeLuca was prepared to testify and both he and Patten planned to have her take the stand. Likewise, he considered Peter DeLuca to be a credible eye witness to the shooting. In addition to several character witnesses, he recalled that Karyn Travelina was a witness who could corroborate DeLuca's version of the events at the after-hours club. GaNun also testified that he did not recall any evidence that suggested that Mr. DeLuca was responsible for the shooting. Nor did DeLuca ever suggest to him that her husband had pulled the trigger.

tion of [the] law and facts relevant to plausible options." Strickland, 466 U.S. at 688, 690. Patten could have fully researched the EED defense and discussed it privately with DeLuca. Nonetheless, the absence of any mention of the EED defense in the presence of others involved in the preparation of DeLuca's trial defense must militate in favor of crediting her version of events and cast doubt on the accuracy of Patten's recollection.

This Court is also not persuaded by the magistrate judge's conclusion that Patten's reason for failing to pursue the EED defense was DeLuca's "absolute aversion to going to psychiatrists" and her refusal "to meet with Dr. Schwartz or, for that matter, any psychiatrist." As Magistrate Judge Roberts correctly stated, psychiatric testimony, although often helpful, is not legally necessary to establish the EED defense in New York State. People v. Moye, 498 N.Y.S.2d 767, 769 (1985). Thus, even if Patten's factual allegations were true, it would not necessarily excuse him from failing to pursue this option.

More troublesome, however, is that Patten's claim that DeLuca had an "absolute aversion" to psychiatrists is contrary to other evidence in the record. For instance, DeLuca met willingly with Colao, a therapist whose interaction with petitioner was comparable to any session with a psychiatrist. Furthermore, DeLuca testified that she underwent psychiatric treatment when she was first incarcerated at Riker's Island. Viewed in its entirety, the evidence suggests that DeLuca was "absolutely adverse" to an insanity defense, not to psychiatrists. According to petitioner's testimony, she told her attorney, "if you want me to talk to a psychiatrist, I'll talk to a psychiatrist." If Patten wished her to visit Dr. Schwartz in order to prepare an EED defense, the Court believes DeLuca would have done so willingly.

In rejecting DeLuca's assertion that Patten led her to believe that EED was a type of insanity defense, the magistrate judge

found that "[i]n light of petitioner's training and experience as a police officer, her claims that she did not understand the difference between an EED defense and an insanity defense is simply incredible." This Court does not share the magistrate judge's incredulity and finds her reasoning flawed.

Although DeLuca served 15 years as a New York City police officer, neither her training nor her experiences introduced her to the intricacies of murder defense theories. Her legal training is limited to that which she received at the police academy in 1967--approximately 15 years before her arrest. The magistrate judge noted that as part of her training, "she had a penal law book and learned to properly cite crimes." However, this fact, standing alone, cannot support a finding that petitioner understood the fine distinction between an insanity defense and the EED doctrine. DeLuca spent most of career as a youth officer working with juveniles. She had virtually no experience testifying in court and there is absolutely no suggestion in the record that she had ever aided any homicide prosecutions where she might have come across the EED defense.

Assuming all police officers have a detailed knowledge of the various legal defenses available in homicide prosecutions is akin to expecting all lawyers, be they merger and acquisitions specialists or public defenders, to be familiar with the booking procedures at local precincts. It is true that police officers and lawyers are both part of the criminal justice system. However, they are separate and discrete parts and each serves a distinct function. The knowledge that each part must have in order to serve its function is limited by its particular role in the system. Thus, while knowledge of the distinction between an EED defense and an insanity defense may be essential to a defense attorney in order to fulfill his role as an effective representative of an accused murderer, it is unnecessary for a police officer to fulfill her role as enforcer of society's laws. Consequently, such

knowledge cannot be imputed to DeLuca merely because she happens to be a former police officer.

Based on her findings of fact, the magistrate judge concluded that DeLuca "clearly understood the EED option, and rejected it because of her aversion to psychiatrists, because it would have required her to admit the shooting, and because even if successful, the EED defense would have resulted in a manslaughter conviction." However, these conclusions are likewise contrary to the evidence.

DeLuca testified that, throughout the case, she intended to tell her version of Bissett's shooting, and made that desire "very clear." Several witnesses corroborated her on this point, including GaNun, who testified that he and Patten had intended to have her testify. This evidence contradicts the magistrate judge's conclusion that she would have forsaken the EED defense because "it would have required her to admit the shooting."

Most damning to Patten's asserted rationale for abandoning the EED defense option, however, is his admitted intention of pursuing the justification defense. As is the case with the EED defense, psychiatric testimony is not legally necessary to present a justification defense. Nonetheless, the testimony of a noted psychiatrist would have been very helpful in explaining why DeLuca feared for her life, despite the fact that she was the one who had the gun. Obviously Patten thought so, since he consulted Dr. Schwartz about this very issue.[18] Yet, despite DeLuca's supposed aversion to psychiatrists and Patten's repeated concerns about the time gap between the rape and the shooting, he continued to consider the justification defense a viable option right up to the point the defense rested.

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[18] As previously noted, Dr. Schwartz's notes indicated on the final page, "psychiatric issue--would it be unreasonable for her to believe he was lunging at her and she had to defend herself."

In addition, the justification defense would also have required DeLuca to admit to the shooting. Thus, it is unreasonable to assume that DeLuca abandoned the EED defense because of this consequence while, at the same time, she eagerly awaited the chance to pursue her self-defense claim in spite of it.

It is equally unpersuasive that petitioner would have rejected the EED defense because it would, at best, have resulted in a manslaughter conviction. Presumably, petitioner would have presented the EED defense in tandem with a justification defense. Thus, once the decision was made to present petitioner's testimony, the inclusion of an EED defense would have merely allowed DeLuca to be convicted of a less severe offense had her justification defense failed. However, a decision to pursue the EED strategy would not have foreclosed the possibility of an outright acquittal--either under the justification doctrine or the principle of jury nullification.

It should have been plainly obvious to Patten that his client understood the EED option to be an insanity defense, or, at the very least, was confused about its operation. This Court believes that petitioner's confusion was the result of her attorney's failure to adequately explain the EED defense to his client. However, even accepting Patten's assertion that he explained the option to DeLuca, his hands-off disclaimer "[w]hether she understood me or not, I don't know," evidences an insufficient attempt to meaningfully "consult with his client on [an] important decision." Strickland v. Washington, 466 U.S. at 688.

Nor can it be doubted that petitioner was prejudiced by this failure of her counsel. Had DeLuca been properly advised concerning the EED defense, there is every reason to credit her claim that she would have testified, hoping for an outright acquittal, but willing to accept a manslaughter conviction under the EED doctrine as an alternative option. Presentation of the EED defense would have been perfectly consistent with

DeLuca's often expressed desire to take the stand and tell her side of the story.

Given the vast array of weapons in the defense arsenal, this Court is convinced that, had DeLuca testified, there is at least a reasonable probability that "the result of the proceeding would have been different." Id. at 694. In addition to humanizing her presence before the jury, DeLuca's testimony would have: 1) provided the jury with an explanation of her behavior during the morning and early afternoon of September 22, 1982; 2) called into question the credibility of the State's two star witnesses, Murphy and Barrett; 3) completely contradicted the State's theory about both the timing and the circumstances surrounding the shooting; 4) explained why Bissett was shot with her weapon; and, 5) revealed why her husband had called the police to report the shooting. Most importantly, her tale of abduction and rape would have provided the jury with evidence to consider in determining whether DeLuca was, in fact, suffering from an extreme emotional disturbance at the time of the shooting.

Judging by the testimony given at the evidentiary hearing, DeLuca would have been a very compelling witness. Patten's investigation into his client's background revealed that she had no prior criminal record, and both Patten and GaNun testified that they had no reason to fear her impeachment based on anything in her past. In addition to her fifteen years as a New York City policewoman, she had served as a nun, schoolteacher, and basketball coach. Many of the people whom she knew from those experiences, including police officials, former teachers, and members of the Franciscan order, were willing to testify about her good character and reputation as a truthful and honest member of the community.

In addition, DeLuca's testimony would not have stood alone. Peter DeLuca, a twenty-eight year veteran of the police force, was an eyewitness to the shooting and could have verified his wife's account of the events of that afternoon and early evening.

In support of both a justification defense and an EED defense, Mr. DeLuca could have described his wife's fragile emotional and physical state when he returned home after driving O'Byrne home. He also could have confirmed that he and his wife returned to the scene of the rape at his insistence, and that the shooting was not a cold-blooded, premeditated murder. Like his wife, Mr. DeLuca probably would have been an impressive witness. Both defense counsel testified that they were unaware of anything in Mr. DeLuca's background that might have called his credibility into question.

Karyn Travelina could have confirmed DeLuca's account of the hostile nature of their initial meeting with Bissett, Barrett, and Murphy at the after hours club, as well as the fact that they left separately and that Travelina was never in the same car as Bissett. This testimony would have rebutted important aspects of the testimony given at trial by Barrett and Murphy.

Travelina also could have testified about meeting DeLuca as she was driving home on the afternoon of September 22. In that meeting, DeLuca allegedly told her that she had been raped, and pleaded with Travelina not to discuss it with anyone. Combined with the testimony of Flora Colao, the rape trauma expert, this testimony would have rebutted the prosecution's theory that DeLuca's behavior and demeanor following the alleged assault were inconsistent with that of a rape victim, and that her rape complaint, filed with Sergeant Eberhardt, was a fabricated exculpatory statement evidencing a guilty mind. In addition, DeLuca told Travelina that she did not have her gun at the time, even though under the prosecution's theory the shooting had already occurred. Finally, Travelina could have testified that she saw no gun in DeLuca's possession.

Colao's testimony would have been useful, not only in explaining DeLuca's behavior after the rape, but in strengthening her affirmative defense claim of extreme emotional distress. According to Colao, rape victims who encounter their assailant

hours after the initial incident commonly suffer a retrauma. This retriggering event wrenches the victim out of denial. Colao testified that the shock may cause a victim to fall apart or go into a rage.

Patten also had medical and physical evidence which he could have presented to corroborate DeLuca's account of abduction and rape. In addition to the medical testimony introduced by the prosecution at trial, which suggested that DeLuca and Bissett had engaged in oral and vaginal sex, Patten could have offered the testimony of Dr. Guidetti, the physician who examined DeLuca the night she reported the rape to the police. Dr. Guidetti, as well as her attending nurse, could have testified that DeLuca suffered vaginal redness and bleeding. Furthermore, Patten could have argued that petitioner's claim of forcible rape was substantiated by her torn underwear. Evidence of that claim could also have been entered in the form of photographs, taken shortly after the incident, which showed bruising on DeLuca's body, and the affidavit of Dr. Clyne, which stated that he did not believe that the bruises on her breasts and thighs were self-inflicted.

DeLuca's version of events was also supported by the physical evidence at the scene of the shooting. Bissett had been found fully dressed, facing forward, with his head between the two front seats of the van. Four bullet holes were found in the right hand side of his head, one of which entered towards the front of his head and exited out the back. The blood found in the van was located in the front section. The driver's side door to the van was open, as were the windows of both doors, which should have made gunshots fired inside the van audible. This description of both the body and van seems oddly incompatible with the State's theory that DeLuca shot Bissett immediately after they had enjoyed consensual sex. Conversely, it seems perfectly consistent with DeLuca's claim that she shot Bissett, well after the rape, from outside the right-hand side, front door of the van.

Evidence of DeLuca's sexual orientation could have been useful in attacking the prosecution's theory that DeLuca had willingly accompanied three strange men to an adult motel because she was interested in having sex with one or more of them. In fact, Patten testified at the hearing that he considered the question of DeLuca's sexuality a "major part" of a potential defense, because, if petitioner was not a heterosexual, it "made no sense whatsoever" for her to initiate a sexual encounter with Bissett and his two friends. The platonic nature of her marriage to Mr. DeLuca may also have refuted the prosecution's insinuation that she was being unfaithful to her husband.

Finally, Patten may have attempted to admit evidence of prior similar conduct by Bissett in order to bolster petitioner's EED claim. While much of the information that Patten and DeLuca uncovered would clearly have been inadmissible at trial, the testimony of Elizabeth Kochovos may have been admitted in conjunction with a justification defense to show DeLuca's state of mind at the time of the shooting.[19]

This Court has no doubt that, had an EED defense been presented, the result of the proceeding would have been different. DeLuca's account of her abduction and rape would clearly

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[19] Respondents argue that all of this evidence, including Kochovos' testimony, would have been inadmissible under People v. Miller, 384 N.Y.S.2d 741, 747 (1976), which requires the defendant to have knowledge of the victim's prior violent acts in order to have them admitted at trial. Since petitioner discovered Bissett's previous acts after the shooting, they argue, she cannot claim that they had an impact on her mental state.

Petitioner would likely argue that the threats Bissett and his friends made to DeLuca during their car ride gave her the requisite knowledge of their previous acts. Whether this would be sufficient to meet the standard of Miller is a matter for the trial court to decide. It is sufficient for this Court's review that Patten could have reasonably attempted to have this evidence admitted, and had it been, it could have helped petitioner's cause.

allow the jury to find that she had "been exposed to an extremely unusual and overwhelming stress" and had "an extreme emotional reaction to it, as a result of which, [she suffered] a loss of self-control and [her] reason [was] overborne by intense feelings, such as passion, anger, distress ... or other similar emotions." People v. Shelton, 385 N.Y.S.2d at 717. The overwhelming amount of corroborating evidence that Patten would have been able to present in support of that account creates at least a reasonable probability that the jury would have found her version credible.

Given these circumstances, the EED defense was obviously a potentially meritorious defense strategy that deserved serious consideration.

> A strong case can indeed be made that failure to advise a criminal defendant of the availability of an affirmative defense when facts known to an attorney suggest that the defense may be meritorious does not constitute "reasonably effective assistance" when judged "under prevailing professional norms."

Mitchell v. Scully, 746 F.2d 951, 954 (2d Cir.1984) (quoting Strickland v. Washington, 466 U.S. at 690). In this case, with facts that made the EED defense such a compelling option, Patten had a duty to make sure his client fully understood the benefits and costs of that strategy, before he rejected the option. In failing to do so, Patten rendered ineffective assistance to his client.

B. Right to Testify

Petitioner's second argument in this petition is that she was deprived of the effective assistance of counsel by her attorney's failure to inform her that the ultimate right to decide whether or not to testify belonged personally to her and not to her lawyer.

In other words, DeLuca claims that she was never told that, notwithstanding her attorney's strong recommendation to the contrary, she had the right to decide to testify. Indeed, there does not seem to be any factual dispute regarding her assertion.

According to the testimony provided at the evidentiary hearing, the decision not to present a defense was made over lunch during a trial recess. DeLuca contends that Patten indicated that the State had failed to meet its burden of proof and that the case was won. DeLuca testified that she was very surprised at Patten's decision, because she had always wanted and expected to testify. She felt that the jury needed to hear her explanation of the events of September 21 and 22, 1982 in order to understand what happened. However, since she believed that her attorney had the authority to decide whether or not she would testify, she yielded to his advice, despite her reservations about his optimistic outlook.

While Patten was understandably unable to recall the specific meal at which this discussion took place, he did remember that he was the one who made the decision not to present a defense after he determined that Justice Tonetti was not going to let Flora Colao testify. According to Patten, Colao's testimony would have functioned as a backdrop in which DeLuca's story would be met with sympathy. Since he was unwilling to have DeLuca take the stand without the benefit of Colao's testimony, Patten decided to rest. More importantly, he believed that the "whodunit" defense was "going to fly."

Patten testified that he made this decision for purely strategic reasons. He did not believe that DeLuca would perjure herself, nor did he have any concerns about her credibility as a witness.[20]

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[20] DeLuca testified that Patten told her that he did not believe that anyone could honestly impeach her. However, he was concerned that, if she testified, the prosecution might put someone on the stand who would lie about her

(continued...)

When questioned on this issue at the evidentiary hearing, Patten stated "I believed Mrs. DeLuca's story then and I believe it today. And I had no doubts about it ... I had no doubt that if I put her on that stand, that she would do well. I didn't think [that the prosecution proved its case]. It was that simple."

Patten recalled himself saying, "Sheila, I'm not putting you on the stand," a decision in which DeLuca eventually "acquiesced." He testified that, in the midst of a trial, he is very "strong willed" and very clear as to whether he wants his clients to testify or not, because he figures, "I'm trying the case, it's their life but I'm trying the case." However, he would never prevent his clients from testifying if they "persist" in demanding to exercise the right. "If they don't persist, many times they are just following what I tell them to do."

Although the testimony of DeLuca and Patten was not consistent in all respects, they agreed on one point critical to this habeas application. At the hearing, Patten candidly admitted that he had never explicitly told DeLuca that it was ultimately her right to decide whether or not to testify in her own defense. The question this Court must now decide is whether, in failing to do so, Patten rendered constitutionally ineffective assistance.

1) Is the right to testify fundamental?

In Rock v. Arkansas, 483 U.S. 44, 49-53 (1987), the Supreme Court held that criminal defendants have a constitutional right to testify in their own behalf rooted in the Fifth, Sixth, and Fourteenth Amendments. The precise nature of that right, however, is still uncertain in the Second Circuit. As the magistrate judge correctly pointed out in her Report, little has

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[20](...continued)
character, in the same way that Barrett and Murphy lied during the State's case.

been written by the Supreme Court or this Circuit to explicitly flesh out the implications of Rock.[21]

However, in United States v. Vargas, 920 F.2d 167 (2d Cir.1990), the Second Circuit decided to publish its opinion rather than decide it by summary order solely "to express [its] substantial doubt about the correctness" of the prosecution's "proposition that a defendant's failure to object at trial to counsel's refusal to allow him to take the stand constitutes a waiver of the defendant's constitutional right to testify on his own behalf." Id. at 170. The Second Circuit's opinion in Vargas appears to indicate that the court is leaning towards finding that the right to testify may be fundamental in nature and hence, personal to the defendant. However, since resolution of that question was not necessary to decide the case, the Second Circuit "le[ft] that issue for another day." The facts of this habeas petition have now put that issue squarely before this Court.

Rock, itself, emphasizes that the right to testify "is one of the rights that 'are essential to due process of law in a fair adversary process' " and that it is "[e]ven more fundamental to a personal defense than the right of self-representation." Rock v. Arkansas, 483 U.S. at 51-52 (quoting Faretta v. California, 422 U.S. 806, 819 n. 15 (1975)).

Furthermore, the Supreme Court acknowledged that "[o]n numerous occasions the Court has proceeded on the premise that the right to testify on one's own behalf in defense to a criminal charge is a fundamental constitutional right." Rock v. Arkansas, 483 U.S. at 53 n. 10. One such occasion was Jones v. Barnes,

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[21] While the Second Circuit has yet to speak on the nature of the constitutional right to testify, it has previously recognized that "the statutory 'privilege' to testify in one's own behalf has come to be recognized as having an importance similar to the right to be present at one's trial and to present a defense." United States v. Bentvena, 319 F.2d 916, 943 (2d Cir.1963).

463 U.S. 745 (1983), in which the Supreme Court held that "the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." Id. at 751. See also Nix v. Whiteside, 475 U.S. 157, 164 (1986) ("[a]lthough this Court has never explicitly held that a criminal defendant has a due process right to testify in his own behalf ... the right has long been assumed"); Wainwright v. Sykes, 433 U.S. 72, 93 n. 1 (1977) (Burger, C.J., concurring) ("Only such basic decisions as whether to plead guilty, waive a jury, or testify in one's own behalf are ultimately for the accused to make."); Brooks v. Tennessee, 406 U.S. 605, 612 (1972) ("whether the defendant is to testify is ... a matter of constitutional right."); Harris v. New York, 401 U.S. 222, 225 (1971) ("Every criminal defendant is privileged to testify in his own defense, or to refuse to do so.").

This Court finds that Rock, especially when read in light of the Supreme Court's earlier precedent, supports the contention that the right to testify is indeed fundamental in character.[22] As

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[22] The fundamental nature of the right to testify is also embodied in the American Bar Association's Standards for Criminal Justice ("ABA Standards") and the American Bar Association's Model Rules for Professional Conduct ("ABA Model Rules"). For example, the ABA Standards provide:

> (a) Certain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel. The decisions which are to be made by the accused after full consultation with counsel are: (i) what plea to enter; (ii) whether to waive jury trial; and (iii) whether to testify in his or her own behalf.

1 Standards for Criminal Justice Standard 4-5.2(a) (2d ed.1980) (emphasis added).

Commentary to this provision further states that "because of the fundamental nature of these three decisions, so crucial to the accused's fate, the

(continued...)

a fundamental constitutional right, the right to testify is personal to the defendant and may not be waived by counsel on the defendant's behalf, regardless of strategic or tactical considerations. Furthermore, as is the case with other fundamental constitutional guarantees, waiver of the right to testify must be both knowing and voluntary. Cf., e.g. Boykin v. Alabama, 395 U.S. 238, 242-43 (1969) (defendant's guilty plea must be made intelligently and voluntarily because it implicates fundamental constitutional rights); Johnson v. Zerbst, 304 U.S. 458, 464-65 (1938) (waiver of right to counsel must be made intelligently and competently).

While the Second Circuit has not yet considered the nature of the right to testify, the vast majority of circuit courts which have addressed this question have explicitly held that the right to testify is fundamental. See e.g., Foster v. Delo, 11 F.3d 1451 (8th Cir.1994); United States v. Moody, 977 F.2d 1425, 1430 (11th Cir.1992); United States v. McMeans, 927 F.2d 162, 163 (4th Cir.1991); Rogers-Bey v. Lane, 896 F.2d 279, 283 (7th Cir.), cert. denied, 498 U.S. 831, (1990); United States v. Martinez, 883 F.2d 750, 754-55 (9th Cir.1989); vacated on other grounds, 928 F.2d 1470 (9th Cir.), cert denied, 501 U.S. 1249, 111 S.Ct. 2886 (1991); Galowski v. Murphy, 891 F.2d 629, 636 (7th Cir.1989); United States v. Bernloehr, 833 F.2d 749, 751 (8th Cir.1987); see also, Lema v. United States, 987

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[22](...continued)
accused must make the decisions." Id. commentary. (emphasis added). Likewise, Rule 1.2(a) of the ABA's Model Rules states:

> In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

Since this petition raises an ineffective assistance of counsel claim, these professional standards are particularly probative in determining the adequacy of counsel's conduct. Strickland 466 U.S. at 688.

F.2d 48, 53 n. 4 (1st Cir.1993) (assuming, without deciding, that the right to testify is fundamental and may not be waived by counsel).

Perhaps the most comprehensive examination of this issue was undertaken by the Eleventh Circuit in United States v. Teague, 953 F.2d 1525 (11th Cir.) (en banc), cert. denied, 113 S.Ct. 127 (1992). In Teague, the court exhaustively reviewed the development of the right to testify and reaffirmed that it is a recognized fundamental constitutional right, personal to the defendant, and one that cannot be waived by the trial court or defense counsel. Teague relied on Rock's holding that the right to testify is "a necessary corollary to the Fifth Amendment's guarantee against compelled testimony" and added that "[u]nder the Supreme Court's reasoning in Rock, the right to testify essentially guarantees the right to ultimately choose whether or not to testify." Id. at 1525 (quoting Rock v. Arkansas, 483 U.S. at 52.).

> A criminal defendant clearly cannot be compelled to testify by defense counsel who believes it would be in the defendant's best interest to take the stand. It is only logical, as the Supreme Court has recognized, that the reverse also be true: A criminal defendant cannot be compelled to remain silent by defense counsel.

United States v. Teague, 953 F.2d at 1525.

While case law clearly demonstrates that the right to testify is fundamental, the more difficult question concerns what actions must be taken by courts and counsel to protect that right. In Johnson v. Zerbst, 304 U.S. 458 (1938), the Supreme Court emphasized the importance of protecting fundamental constitutional rights during the course of a trial.

> It has been pointed out that "courts indulge every reasonable presumption against waiver" of fundamental constitutional rights and that we "do not presume acquiescence of the loss of fundamental rights." A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege.

Id. at 464 (citations omitted).

Three suggested methods have been developed in case law and academic literature to protect the defendant's fundamental right to testify. The first, adopted by the majority in Teague, holds the defense attorney primarily responsible for safeguarding his client's right to testify. Under this theory, an ineffective assistance of counsel claim, on either direct or collateral review, is the proper remedy for any violation of that right. While assuring that the defendant's waiver of her right is both knowing and voluntary, this model would prevent the court from invading the attorney-client relationship or unintentionally inducing the defendant to abandon her right to remain silent. See also, Foster v. Delo, 11 F.3d 1451, 1456-59 (8th Cir.1994).

The second method places the burden of protecting the right to testify on the trial courts. Analogizing to the protections afforded other fundamental constitutional rights, this approach would employ the procedural safeguard of an on-the-record colloquy between the trial judge and the defendant to ensure that waiver of the right is both knowing and intelligent. See Boykin v. Alabama, 395 U.S. 238, 242 (1969) (holding that the record must affirmatively show that the defendant validly waived those constitutional rights necessarily waived by entry of a guilty plea, including the right to go to trial and the right to trial by jury); Carnley v. Cochran, 369 U.S. 506, 516 (1962) (requiring evidence that showed that the "accused was offered counsel, but intelligently and understandingly rejected the offer"); Adams v. United States ex rel. McCann, 317 U.S. 269 (1942) (on the

record colloquy required to waive jury trial); Johnson v. Zerbst, 304 U.S. 458, 58 (1938) ("whether there is a proper waiver [of the right to counsel] should be clearly determined by the trial court and ... that determination [should] appear upon the record.")

In addition to protecting the defendant's fundamental right, the existence of an on-the-record waiver would have the added benefit of "foreclosing subsequent collateral proceedings" that would become "an after-the-fact swearing contest between the defendant and counsel as to whether the defendant validly waived the right to testify." United States v. Teague, 953 F.2d at 1544. (Clark, J., concurring in part and dissenting in part). See also, United States v. Martinez, 883 F.2d 750, 764 (9th Cir.1989) (Reinhardt, J., dissenting), vacated, 928 F.2d 1470 (9th Cir.1991); Hollenbeck v. Estelle, 672 F.2d 451 (5th Cir.1982) (noting that state trial judge's colloquy with defendant was "a model of appropriate judicial concern for the constitutional rights of a criminal defendant.").

Finally, the third approach ultimately rests the burden of protecting the fundamental right to testify on the defendant, herself. Under this theory, the right to testify, merely a subordinate reciprocal right of the right to remain silent, does not attach until the defendant affirmatively asserts it in court. Any failure on the part of the defendant to affirmatively act to protect that right constitutes a valid waiver. See, United States v. Bernloehr, 833 F.2d 749, 752 (8th Cir.1987). United States v. Teague, 953 F.2d at 1537-41 (Birch, J., concurring in judgment). This model seems to ignore the requirement that waiver of a fundamental right must be both knowing and voluntary. Clearly, a defendant who is unaware that she has a right to assert her desire to testify over her attorney's wishes cannot be deemed to have waived her right knowingly and voluntarily.

Petitioner claims that it was her counsel's failure to inform her of her rights that deprived her of her ability to knowingly and

voluntarily choose whether to testify. Following the logic of the Teague majority, petitioner argues that the proper vehicle to vindicate her right to testify is a claim of ineffective assistance of counsel. In Teague, the court articulated the minimum duty that counsel owes to his clients by stating, "[d]efense counsel bears the primary responsibility for advising the defendant of his right to testify or not to testify, the strategic implications of each choice, and that it is ultimately for the defendant himself to decide." United States v. Teague, 953 F.2d at 1533. Such advice is "crucial," the court held, "because there can be no effective waiver of a fundamental constitutional right unless there is an 'intentional relinquishment or abandonment of a known right or privilege' " Id. (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (emphasis added)).

Accordingly, the court held that

> if defense counsel never informed the defendant of the right to testify, and that the ultimate decision belongs to the defendant, counsel would have neglected the vital professional responsibility of ensuring that the defendant's right to testify is protected and that any waiver of that right is knowing and voluntary. Under such circumstances, defense counsel has not acted within the range of competence demanded of attorneys in criminal cases, and the defendant clearly has not received reasonably effective assistance of counsel.

Id. at 1534 (quoting Strickland v. Washington, 466 U.S. at 687) (emphasis added).

At the same time, however, the court held that "if counsel believes that it would be unwise for the defendant to testify, counsel may, and indeed should advise the client in the strongest possible terms not to testify. The defendant can then make the

choice of whether to take the advice of competent counsel." Id. at 1533 (footnote omitted).

Applying these principles to the case before it, the court in Teague found that "the evidence fail[ed] to show that the Defendant's will was 'overborne' by his counsel. The Defendant was advised of his right to testify, was advised that he should not exercise that right, and did not protest." Id. at 1534-35. However, unlike Patten, Teague's counsel testified at the evidentiary hearing that she had probably explained "that whether [Teague] would testify ultimately would be his decision." Id. at 1528.

Petitioner argues that, since Patten concedes that he never informed her that she had the final right to decide whether or not to testify, this Court should apply the holding of Teague and find that her counsel did not act "within the range of competence demanded of attorneys in criminal cases." Id. at 1534.[23]

2) Is there a procedural bar to applying the rule of Teague to DeLuca?

Magistrate Judge Roberts noted in her Report that "if this court were to hold that the failure to advise a defendant that the ultimate decision regarding whether to testify belonged to her is outside the range of competence demanded of attorneys in criminal cases, it would be announcing a new constitutional rule of criminal procedure in violation of Teague v. Lane, 489 U.S. 288 (1989)."

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[23] A few courts have already applied this logic. For instance, in Foster v. Delo, 11 F.3d 1451 (8th Cir.1994), the court held that the law is clear that the defendant has the ultimate authority to make the fundamental decision of whether or not to testify. Failure to inform the defendant of this right "impeded an informed decision whether to waive or invoke a fundamental constitutional guarantee." Id. at 156-59; see also, United States v. Robles, 814 F.Supp 1233, 1245 (E.D.Pa.1993) (finding that counsel made it clear to defendant that the final decision on whether or not to testify was his alone).

Petitioner objects to this finding, arguing that it has been established for years that the accused, not counsel, has the ultimate right to decide whether to testify. Thus, a holding that counsel's failure to inform a client of this fundamental right falls outside the bounds of competent representation would not be a "new" rule, but rather an application of settled precedent.

It is clear that "habeas corpus cannot be used as a vehicle to create new constitutional rules of criminal procedure unless those rules would be applied retroactively to all defendants on collateral review through one of the two exceptions we have articulated." Teague v. Lane, 489 U.S. at 316 (hereinafter Lane).[24] However, exactly what constitutes a new rule is not always easy to determine. According to Justice Harlan, whose earlier dissents later served as the foundation of the Court's opinion in Lane:

> The theory that the habeas petitioner is entitled to the law prevailing at the time of his conviction is, however, one which is more complex than the Court has seemingly recognized. First, it is necessary to determine whether a particular decision has really announced a "new" rule at all or whether it has simply applied a well-established constitutional principle to govern a case which is closely analogous to those which have been previously considered in the prior case law.... [M]any though not all, of this Court's constitutional decisions are grounded upon fundamental principles whose content does not change dramatically from year to year, but whose meanings are altered slowly and subtly as generation succeeds generation. In such a context it appears

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[24] In order to avoid confusion with United States v. Teague, another case continuously cited in this opinion, the Court will refer to Teague v. Lane as Lane.

> very difficult to argue against the application of the "new" rule in all habeas cases since one could never say with any assurance that this Court would have ruled differently at the time the petitioner's conviction became final.

Desist v. United States, 394 U.S. 244, 263-64 (1969) (Harlan, J., dissenting).

Lane provides some guidance for determining when a habeas petitioner should be denied the benefit of a new rule. "In general," the Court stated, "a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government.... To put it differently, a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." Teague v. Lane, 489 U.S. at 301. Addressing the concerns expressed by Justice Harlan in Desist, the Court distinguished new rules from those rules that are "merely applications of principles that were settled at the time of conviction." Yates v. Aiken, 484 U.S. 211, 216 (1988).

Before determining whether the rule announced in United States v. Teague amounts to a "new" rule, it is important that this Court first clarify Teague's holding. In imposing a duty on counsel to protect their clients' right to testify by ensuring that they are aware of that right and that it is ultimately their decision to make, the Teague majority did not establish a prophylactic rule, such as the one announced in Miranda v. Arizona, 384 U.S. 436, 467-473 (1966) (holding that, absent other effective measures to protect the Fifth Amendment privilege against self-incrimination, a person in custody must be warned prior to interrogation that he has certain rights, including the right to remain silent). There is no blanket requirement that counsel must explicitly warn all of their clients that they have the ultimate right to decide whether or not to testify.

Rather, reviewing courts must apply a preponderance of evidence test. If "the preponderance of credible evidence indicates that [the] defendant was fully aware, as a result of his discussions with counsel, that it was ultimately his decision whether to testify or not and that he agreed with counsel that it was not in his best interest to do so," then defense counsel has rendered effective assistance. United States v. Palma-Rodriquez, 819 F.Supp. 1064, 1066 (M.D.Fla.1993) (applying the holding in Teague). Conversely, if the preponderance of evidence leads to the conclusion that the defendant was unaware that it was ultimately her decision to make, and counsel does not correct this misperception, then counsel has failed to render adequate assistance. This Court must now determine whether applying this interpretation of Teague amounts to the adoption of a new rule in violation of Lane.

As a threshold matter, this Court believes that the principle that the accused has the ultimate right to decide whether or not to testify is not a "new" rule within the meaning of Lane. While Lane did identify part of Rock's holding--that a state cannot prevent the testimony of a defendant by the arbitrary application of its evidentiary rules--as a new rule, Teague v. Lane, 489 U.S. at 301, the same cannot be said for Rock's recognition of the fundamental right underlying its decision. In fact, the language of Rock explicitly indicates that the Court was merely applying a well-settled principle in noting that there is a constitutional right to testify. "At this point in the development of our adversary system, it cannot be doubted that a defendant in a criminal case has the right to take the witness stand and to testify in his or her own defense."[25] Rock v. Arkansas, 483 U.S. at 49.

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[25] See also, United States v. Bernloehr, 833 F.2d 749, 751 (8th Cir.1987), which characterized Rock as "explicitly confirm[ing] that criminal defendants have a constitutional right to testify."

Furthermore, in addition to the prior Supreme Court case law cited in Rock itself, many circuit courts had earlier applied the same logic that the Supreme Court would later use in Rock to find that the right to testify ultimately belongs to the defendant. United States v. Curtis, 742 F.2d 1070, 1076 (7th Cir.1984); United States ex rel. Wilcox v. Johnson, 555 F.2d 115, 118-119 (3d Cir.1977) (noting an "enlightened trend" in federal and state case law that teaches that "a criminal defendant's right to testify in his own defense is of such fundamental importance that no defendant" may be denied that right); Winters v. Cook, 489 F.2d 174, 178-179 (5th Cir.1973) (holding that the right to testify is "such an inherently personal fundamental right that it can be waived only by the defendant and not by his attorney.")[26] Thus, this Court finds that at the time of her conviction, DeLuca had the ultimate right to decide whether or not to testify.

However, this holding is not enough to find that petitioner's counsel was ineffective. To do so, this Court must hold that counsel's failure to inform his client that she had the ultimate right to decide whether or not to testify falls outside the bounds of competent representation. Petitioner contends that this holding would not be a "new" rule. Rather, the Court would merely be applying the well settled precedent that a defendant's waiver of a fundamental constitutional right must be both knowing and voluntary. After all, petitioner argues, a defendant cannot knowingly and voluntarily waive her right to testify, if she is unaware that it is her decision to make. Indeed, as early as 1964, Judge J. Skelly Wright wrote:

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[26] In addition, the American Bar Association's Standards for Criminal Justice and Model Rules for Professional Conduct have long counseled that the defendant must be the one to ultimately decide whether or not to testify. See, supra, footnote 22.

> the right to testify is a basic right, and there is an obligation on the part of both the Court and trial counsel to inform the accused of his right to testify, if he so desires. Further, it is the duty of both to assure that the exercise of this basic right by the accused is a free and meaningful decision. The right to testify is personal to the accused. He must make the ultimate decision on whether or not to take the stand. In this regard, it is unlike other decisions, which are often called 'trial decisions,' where it is counsel who decides whether to cross-examine a particular document. Here it is the accused who must decide and it is the duty of counsel to present to him the relevant information on which he may make an intelligent decision.

Poe v. United States, 233 F.Supp. 173 (D.D.C.1964) (emphasis added).

Yet, as persuasive as petitioner's argument might be, it cannot withstand the Supreme Court's retroactivity analysis. Lane's new rule definition has since been interpreted to include all rules whose validity under existing precedents is "susceptible to debate among reasonable minds." Wright v. West, 112 S.Ct. 2482, 2489 (1992) (quoting Butler v. McKellar, 494 U.S. 407, 415 (1990)). But see, Wright v. West, 112 S.Ct. at 2496 ("[T]he standard for determining when a case establishes a new rule is 'objective,' and the mere existence of conflicting authority does not necessarily mean a rule is new.") (O'Connor, J., concurring in judgment). Clearly, few rules, if any, will fall outside this expansive definition. The disagreement among the judges concurring and dissenting in Teague illustrates that the rule petitioner wishes this Court to adopt is susceptible to debate among reasonable minds. Therefore, this Court must agree with the magistrate judge's finding that, to hold that counsel's failure to inform his client that she is the ultimate decision maker

regarding whether or not to testify falls beyond the bounds of competence demanded of attorneys in criminal cases, would be to announce a new constitutional rule of criminal procedure.

However, the Supreme Court has established two exceptions to the general rule of nonretroactivity for cases on collateral review. Teague v. Lane, 489 U.S. at 311-313. The first applies to rules that place certain types of individual conduct outside the realm of criminal punishment. This exception obviously does not apply to the facts of this petition. The second Lane exception "applies to new 'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." United States v. Salerno, 964 F.2d 172 (2d Cir.1992) (quoting Saffle v. Parks, 494 U.S. 484, 486 (1990)).

The new rule, urged by petitioner, holding defense counsel responsible for informing his client that she has both the right to testify, and the ultimate authority to decide whether or not to take the stand, fits within the second Teague exception and thus can be adopted on collateral review. As previously noted, the Supreme Court held in Rock that the "accused's right to present his own version of events in his own words" is "essential to due process of law in a fair adversary system" and is "[e]ven more fundamental to a personal defense than the right of self-representation." Rock v. Arkansas, 483 U.S. at 51-52 (internal quotation omitted). Furthermore, it cannot be doubted that a new rule protecting a defendant's right to testify "is central to an accurate determination of innocence or guilt." Teague v. Lane, 489 U.S. at 313, 109 S.Ct. at 1076. "Taking the stand is the defendant's opportunity, if he wants it, to face his accusers and the jury, tell his story, submit to examination, and exercise such ability as he may have to persuade those who will make a decision that may vitally affect his life." Wright v. Estelle, 572 F.2d 1071, 1081 (5th Cir.1978) (Godbold, J., dissenting).

Thus, this Court finds that defense counsel has the crucial responsibility of protecting his client's fundamental right to testify and assuring that any waiver of that right is both knowing and voluntary. Consequently, if counsel has failed to inform the defendant that the ultimate right to decide whether or not to testify belongs to the defendant, and the preponderance of credible evidence indicates that the defendant was not independently aware of this right, then counsel has rendered ineffective assistance to his client.

3) Did petitioner knowingly and voluntarily waive her right to testify?

In her report, Magistrate Judge Roberts found that DeLuca "was adequately advised of her right to testify, and ultimately agreed, perhaps reluctantly, with her attorneys' judgment that she should not testify." While this Court agrees with the magistrate judge that petitioner was aware of her right to testify, the Court does not believe that the evidence shows that she was aware that it was ultimately her decision to make.

The magistrate judge reached her conclusion by first noting that it was Patten's "general practice to inform his clients of their options and advise them of his opinion, but that he never made the decision for a client or stood in the way of a client intent on taking the stand." It was the magistrate judge's opinion that Patten could have reasonably concluded that an explicit statement of petitioner's right to decide was unnecessary given her participation in the many discussions on defense strategy and her fifteen years experience as a New York City police officer.

As was the case in discussing the EED defense, this Court does not find the argument that petitioner was aware of all her rights simply because she was a police officer persuasive. While her police experience may have taught her that defendants had a general right to testify, nothing in her training or experience as a police officer educated her as to the constitutional

apportionment of decision-making authority within the attorney-client relationship.

In fact, a credible argument could be made in support of the opposite conclusion. Police officers are constantly advising people of their rights, rights that are often not asserted until the individual's attorney arrives at the police station. Defense lawyers are often seen as the nemesis of the police because they invoke rights that the police believe impede an investigation. Given the power attorneys appear to wield at the station house, it would not be surprising to find officers who believe that counsel possesses the ultimate authority to decide whether or not his client will testify.

At the evidentiary hearing, DeLuca testified that she thought her lawyer had the ultimate right to decide whether she would testify. Standing alone, this allegation would not suffice. A "barebones assertion" by a defendant that her counsel failed to inform her of her rights is insufficient to establish an ineffectiveness of counsel claim under Strickland. See Underwood v. Clark, 939 F.2d 473, 475-76 (7th Cir.1991). Without more, this Court would likely agree with the findings of the magistrate judge.

However, DeLuca's claim is supported by independent corroboration. Flora Colao testified at the evidentiary hearing that, during her meetings with petitioner, DeLuca repeatedly informed her that she wanted to testify, but was uncertain whether her lawyer would let her. According to Colao, "[s]he was very confident that the jury would understand if she had the opportunity to tell her story and felt very strongly that she had nothing to hide, because she kept saying I have nothing to hide, I'm willing to testify ... And she just kept saying I want to testify, but I don't know if they'll let me."

This corroborating testimony persuades the Court that DeLuca was, in fact, unaware that she had the ultimate right to decide whether or not to testify. Since the preponderance of evidence

suggests that the petitioner was unaware that it was ultimately her decision whether or not to testify, and counsel admittedly did not correct that misperception, this Court finds that petitioner has been denied effective assistance of counsel.

Nor can there be any doubt that DeLuca suffered prejudice as a result of her counsel's failure to inform her that she had the ultimate right to decide whether or not to testify. Given her repeatedly expressed desire to tell her side of the story, it is highly likely that the petitioner would have exercised her right had she known that her decision overrode her lawyer's. Numerous witnesses, including GaNun, one of her attorneys, testified that DeLuca both wanted and expected to testify at her trial.

Likewise, it is at least reasonably probable that had she testified, "the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. at 694. "The testimony of a criminal defendant at his own trial is unique and inherently significant. 'The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself." Nichols v. Butler, 953 F.2d 1550, 1553 (11th Cir.1992) (quoting Green v. United States, 365 U.S. 301, 304 (1961)).

In many criminal cases, "the most important witness for the defense ... is the defendant himself" Rock v. Arkansas, 483 U.S. at 52. Nowhere would that truism have been more applicable than in the instant case. Had DeLuca taken the stand, her testimony would have been the cornerstone of a defense that, if successfully presented, could have: 1) explained much of the persuasive circumstantial evidence against her; 2) cast doubt on the veracity of the prosecution's two main witnesses; 3) provided some explanation for the shooting; 4) called Bissett's motivations on the night of the shooting into question; 5) educated the jury about Rape Trauma syndrome; and 6) painted a picture of herself that contradicted the prosecutor's portrayal

of her as a black widow spider, a sex-starved woman who mates and then kills.

Moreover, had she testified, Patten, who testified that he was unwilling to present a "partial defense" because he feared that the jury would wonder what they had to hide, would have felt free to support her version of events both with corroborating testimony and medical and physical evidence. Under these circumstances, this Court holds that DeLuca received constitutionally ineffective assistance of counsel.

III. Preclusion of Expert Witness on Rape Trauma Syndrome

Finally, petitioner contends that the trial court's refusal to allow Flora Colao, the rape trauma syndrome expert, to testify violated her Sixth and Fourteenth Amendment right to present a defense. While this Court believes that Colao's expert testimony could have been admitted to refute the State's contention that DeLuca's rape claim was a false exculpatory statement evidencing knowledge of guilt, we find that the decision to exclude the testimony was well within Justice Tonetti's discretion.

After the prosecution rested, Patten requested permission to present the testimony of a defense expert regarding rape trauma syndrome. Arguing that "the law has for generations had a very male view on the concept of rape," Patten sought to introduce Colao's testimony to rebut the commonly held notion that a rape victim will make an immediate outcry. Patten contended that this notion results in a "prejudic[ial] belie[f]," reflected during

the trial in the testimony of Detective Taylor,[27] that a woman who does not immediately call for help has not been raped.

Although sympathetic to Patten's argument, Justice Tonetti questioned "the relevancy of rape to this case."[28] In response, Patten replied that rape was relevant because of the prosecution's position "from the very beginning of this case that ... 'All you individuals know when you are being told a story.' " Referring to the testimony of Sgt. Eberhardt, he argued that part of the

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[27] Detective Taylor testified at trial that he believed the sexual activity that took place in the van was consensual because

> [b]ased on my investigation and my interview of witnesses at the scene and what they observed, there was no one screaming rape from the van. The van was seen in a rocking motion. There didn't seem to be any type of a fight going on at the time that this allegedly occurred.

It is interesting that Detective Taylor found the absence of a cry of rape to be significant, but considered the absence of the sound of gunshots to be easily explained by the relatively high level of noise in the area.

[28] Judge Tonetti explained to Patten:

> The theory of the prosecution in this case is based on circumstantial evidence.... That this defendant had access to the deceased, was last seen with the deceased, left the vicinity of the deceased prior to his demise, and that her gun killed him. That's the theory of the prosecution. It has nothing to do with whether she was raped or had consensual sex.... My question to you is what if she was raped?

State's circumstantial evidence involved the testimony and argument that DeLuca created a false rape story to cover her guilt.[29]

Although Justice Tonetti reserved decision on the matter until after a short adjournment for lunch, he did express skepticism about Patten's grounds for admitting the testimony of Colao. Conceding that the proposed testimony "could be offered on the theory that it might have affected the mind or the state of mind of Peter DeLuca," the judge was still unwilling to admit it because there had been no evidence of Peter DeLuca's involvement in the shooting.

> If Peter DeLuca were to testify, that might be a factor. If [DeLuca herself] had testified she had been raped that might be a factor, but to allow an expert to testify about reactions of a rape victim on the theory that maybe that had some effect on someone seems to me to give rise to sheer speculation.

After the lunch recess, proceedings resumed and counsel and the court conferred at the bench in an off-the-record discussion. Both sides then rested in the presence of the jury. The record

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[29] Patten also contended that rape was relevant because, "if you have a circumstantial evidence case, it's just as likely that there would be a husband who finds out the wife has been raped, and in his own rage goes down and shoots the guy. We are allowed to argue that theory." However, that theory, part of Patten's "whodunit" defense, does not depend on proof that DeLuca was actually raped. All that need be shown is that Mr. DeLuca believed she was raped--something he could do even if it were not true. Thus, contrary to Patten's argument, Colao's testimony was irrelevant to this theory.

reflects no further discussion of the proposed expert testimony, no request for a ruling by defense counsel, and no decision by Justice Tonetti.

Respondents contend that petitioner abandoned her request to present the proposed expert testimony because she did not request a ruling from Justice Tonetti at trial. Therefore, they argue, she is procedurally barred from raising this claim in her habeas petition. The magistrate judge rejected this argument, finding that Justice Tonetti had put an end to this issue in his ruling at the s 440 hearing. Although admitting that his decision may have been off the record, Justice Tonetti stated that "my recollection is that ... the court made a ruling denying counsel's application to call that witness and that it was preserved for the record." This Court accepts Magistrate Judge Roberts recommendation that the respondents' assertion of a procedural default be rejected.

Turning to the merits of petitioner's claim, the magistrate found that Justice Tonetti did not abuse his discretion in excluding the proposed testimony because it was both collateral and of questionable probative value. Furthermore, she found that even assuming, arguendo, that he erred in precluding Colao's testimony, such error was not of constitutional dimension. Alternatively, if it was a constitutional error, it was harmless. The Court agrees with all of these findings and accepts them as its own.

It is well-established that a trial judge has broad discretion in determining the relevancy and admissibility of evidence. Levy v. Abate, 93 Civ. 0258 (JSM), 1993 WL 267421 (S.D.N.Y. July 9, 1993); People v. Cronin, 470 N.Y.S.2d 110, 111 (1983) ("The admissibility and bounds of expert testimony are addressed primarily to the sound discretion of the trial court.").

Moreover, even if erroneous, evidentiary rulings by state courts "do not automatically rise to the level of constitutional error sufficient to warrant issuance of a writ of habeas corpus."

Taylor v. Curry, 708 F.2d 886, 891 (2d Cir.1983). A defendant is entitled to habeas relief only when she can show that the error was so prejudicial as to amount to a denial of due process or that it was tantamount to the denial of a "fundamentally fair trial." Id. at 891 (emphasis in original; citations omitted). "It is the materiality of the excluded evidence to the presentation of the defense that determines whether a defendant has been deprived of a fundamentally fair trial." Rosario v. Kuhlman, 839 F.2d 918, 925 (2d Cir.1988) (citing Taylor v. Curry). Erroneously excluded evidence is material, and constitutional error has been committed " 'if the omitted evidence creates a reasonable doubt that did not otherwise exist'." Rosario, 839 F.2d at 925 (quoting United States v. Agurs, 427 U.S. 97, 112-13 (1976)).

While the testimony of Flora Colao was arguably relevant to the State's characterization of DeLuca's rape report as a false exculpatory statement that circumstantially demonstrated her consciousness of guilt, Justice Tonetti did not abuse his discretion in disallowing it. In the absence of a justification defense, Justice Tonetti was correct in arguing that the truth or falsity of DeLuca's rape claim was a collateral issue and of limited probative value.

> Where the proposed evidence is not critical factual testimony but expert testimony offered for the very limited purpose of supporting credibility, the trial court's failure to admit such testimony did not deny defendant her Sixth Amendment right to present witnesses in her defense.

Fennell v. Goolsby, 630 F.Supp. 451 (E.D.Pa.1985).

Moreover, petitioner's proposed expert had no personal knowledge of the facts surrounding the shooting. "The testimony excluded was not that of a 'key fact witness' who actually observed the crime. Rather petitioner's expert would have

testified as to petitioner's state of mind.... The Constitution does not require that such testimony be admitted." Tourlakis v. Morris, 738 F.Supp. 1128 (S.D.Ohio 1990).

To the extent Patten wished to introduce this testimony as a foundation for a justification defense, as he appeared to be claiming at the evidentiary hearing before the magistrate judge, then the fault lies with Patten. Justice Tonetti clearly indicated that he would have been receptive to Colao's testimony, if it were presented in conjunction with DeLuca's testimony. At no time did Patten suggest to Justice Tonetti that the expert's testimony would be part of a justification defense, or that petitioner would be testifying that she had committed what she believed to be justifiable homicide.

In order to violate the Sixth Amendment, the omitted evidence must "create [ ] a reasonable doubt that did not otherwise exist." Rosario, 839 F.2d at 925. Even if, based upon Colao's testimony, the jury might be more inclined to believe that DeLuca had been raped, the fact that it was her gun that killed Bissett and that she had access to him prior to his death remained unchallenged. Accordingly, in the absence of a justification defense, the fact that petitioner may have been raped created no reasonable doubt that did not otherwise exist. For the same reasons, any constitutional error in excluding the expert's testimony did not have a "substantial and injurious effect or influence" on the jury's verdict. Brecht v. Abrahamson, 113 S.Ct. 1710, 1714, 1722 (1993).

Conclusion

This Court finds that Patten's actions in failing to 1) inform and advise DeLuca about the option of an EED defense and 2) inform his client that she had the ultimate right to choose whether or not to testify, were sufficient to undermine confidence in the outcome of DeLuca's trial.

For the reasons set forth above, DeLuca's petition for a writ of habeas corpus is granted and the conviction set aside. DeLuca is to be released from prison unless she is afforded a new trial within 180 days of this date.

It is so ordered.

Dated: New York, New York
August 4, 1994

/s/ Robert J. Ward
U.S.D.J.

APPENDIX C

Appendix C

Report and Recommendation of the United States Magistrate Judge (Roberts, J.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SHEILA RYAN DELUCA,

Petitioner,

-against-

REPORT AND RECOMMENDATION

ELAINE S. LORD, Superintendent
Bedford Hills Correctional Facility,

90 Civ. 4026 (RJW)

Respondent.

TO THE HONORABLE ROBERT J. WARD:

This petition for a writ of habeas corpus was filed on June 13, 1990, and referred to me for Report and Recommendation on January 24, 1991. An evidentiary hearing was held on July 21, 22, 23 and 29, 1992. For the reasons set forth below, I recommend that the writ be denied.

PROCEDURAL HISTORY

On April 18, 1984, following trial by jury in the Supreme Court of the State of New York, Bronx County, petitioner, Sheila Ryan DeLuca, was found guilty of Murder in the Second

Degree (New York Penal Law § 125.25(1)). Petition ¶¶ 1-6; Affidavit of Assistant District Attorney Jonathan Svetkey, dated November 1992 ("Svetkey Aff.") ¶ 3. Petitioner is currently serving an indeterminate prison term of from twenty years to life, which was imposed on May 18, 1984, following the denial of her motion to set aside the verdict.[1] Petition ¶¶ 2-3; Svetkey Aff. ¶¶ 4-5.

On April 11, 1985, the Appellate Division, First Department, unanimously affirmed petitioner's conviction, without opinion, People v. DeLuca, 488 N.Y.S.2d 529 (1st Dept. 1985), and on April 15, 1985, petitioner's application for leave to appeal to the Court of Appeals was denied. People v. DeLuca, 65 N.Y.2d 978 (1985); Petition ¶¶ 8-9 Svetkey Aff. ¶¶ 6-8, Exs. 1-3. Petitioner's November 1985 petition for a Writ of Certiorari was denied on February 24, 1986. DeLuca v. New York, 475 U.S. 1012 (1986); Petition ¶ 9 (f); Svetkey Aff. ¶ 10.

On May 3, 1989, petitioner filed a motion to vacate her judgment of conviction pursuant to N.Y. Crim. Proc. L. § 440.10, which was denied on August 24, 1989, without a hearing. Petition ¶ 11(a);Svetkey Aff. ¶¶ 11-12, Exs. 4-7. On December 12, 1989, the Appellate Division, First Department, denied petitioner's application for leave to appeal the denial of her § 440 motion. Petition ¶ 11(d); Svetkey Aff. ¶ 13.

THE PRESENT PETITION

In the present petition, filed on June 13, 1990, petitioner seeks a writ of habeas corpus, raising the same claims contained in her § 440 post-conviction motion, i.e., that she was denied effective assistance of counsel and deprived of her Sixth and Fourteenth Amendment rights to present a defense by the exclusion of expert testimony.

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[1] See Svetkey Aff. Ex. 1 at 9-10; Petitioner's Appendix ("A.") 16-20, 379-403, 469.

With respect to petitioner's ineffective assistance of counsel claim, the petition reads as follows:

> Petitioner's version of the events relevant to her case, which was related to her trial counsel early in the case, raised a possible defense of extreme emotional disturbance. However, counsel never informed her to the existence of this possible defense or permitted her to decide whether to pursue it at trial. Counsel also never informed petitioner that she had the final right to decide whether to testify, and deprived her of other critical decision relating to her case, thus prejudicing her defense.

Petition ¶ 12A.

With respect to petitioner's claim regarding the preclusion of expert testimony on rape trauma syndrome, the petition reads as follows:

> The prosecution introduced statements from petitioner indicating she had been raped. The prosecution further elicited testimony concerning petitioner's behavior following [the] incident in question, and argued that this behavior was inconsistent with rape, that petitioner's statements had been false, and that she was therefore guilty. Petitioner sought to call on her defense case an expert on rape trauma syndrome to testify concerning the normal behavior exhibited by rape victims, in order to undercut the prosecutor's argument. The trial judge refused to permit this witness to be called.

Petition ¶ 12B.

THE EVIDENCE AT TRIAL

Summary

The prosecution sought to prove at trial that petitioner, a recently retired New York City police officer, murdered Robert Bissett on September 22, 1982. The prosecution contended that petitioner met Bissett and his friends, Eugene Murphy and Robert Barrett, at around 4:00 a.m. on September 22 at an after hours club on East 231st Street in the Bronx. At around 7:30 a.m., petitioner, her friend Karyn Travelina,[2] Bissett, Murphy and Barrett left the club together. After dropping Travelina off, petitioner drove Bissett, Murphy and Barrett around the Bronx in her car, drinking beer and wine, and stopping at Bissett's house so that petitioner could use the bathroom. The four drove to the Bronx Park Motel, where a room was rented and Barrett and Murphy left Bissett and petitioner. Petitioner and Bissett eventually parked petitioner's car near the social club and drove in Bissett's van to a location along side the service road to the Major Deegan Expressway where, after engaging in sexual intercourse, petitioner shot and killed Bissett in the early afternoon of September 22.

Petitioner arrived home at about 2:30 p.m. At approximately 7:00 p.m., petitioner's husband, Peter DeLuca, made a series of telephone calls to the police telling them that they would find a body in a van near the Major Deegan Expressway and Fordham Road, and that the man in the van had raped his wife. The police who responded to the scene found Bissett's fully-clothed body in the rear of the van, with four bullet holes in his head. Petitioner later told the police that she had been forced into a van by three men and later driven by one of the men to a location near the Major Deegan Expressway and Fordham Road,

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[2]This person's name appears incorrectly in the trial transcript as "Karen Travelena."

where she was raped in the back of the van. At approximately 8:45 p.m., at petitioner's house, the police obtained petitioner's off-duty service revolver, which was the gun used to kill Bissett.

Petitioner presented no evidence, but contended that she had been raped, that the prosecution had offered no evidence that she had a gun with her when she was with Bissett, that the prosecution had failed to establish that it was petitioner who shot Bissett, and that the prosecution had failed to eliminate her husband as the shooter.

The Prosecution's Case

In September 1982, 28-year-old Robert Bissett, a probationary fireman with nine months service on the New York City Fire Department, lived at home with his widowed mother, Helen Bissett, in the North Bronx (H. Bissett: T. 296).[3] In addition to serving as a firefighter, Bissett did some house painting as a sideline and would at times employ his 22-year-old friend, Robert Barrett, to help him on a part-time basis (Barrett: T. 38, 40, 119).

At about 6:30 p.m. on the evening of Tuesday, September 21, 1982, Bissett was in his black Ford van with his girlfriend "Sophie," when they saw and picked up Bissett's lifelong friend, Eugene Murphy, at East 231st Street in the Bronx (Murphy: T. 160). Murphy, a New York City Emergency Medical Service Paramedic who was scheduled to be married four days later, was off from work for a couple of weeks (Murphy: T. 158, 161). Bissett dropped Sophie at her home and, after Murphy stopped at his house to get some money, the young men picked up a friend named "Gerard" and went on to meet Barrett between

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[3]Numerical references preceded by "T." are to the pages of the transcript of the trial; those preceded by "S." are to the pages of the post-verdict proceedings and sentence; and those preceded by "H." are to the pages of the 1992 habeas hearing transcript.

8:30 and 9:30 p.m. on East 231st Street and Broadway (Barrett: T. 41-42, 101; Murphy: T. 160-62). Barrett's 16-year-old girlfriend, Patricia Engstrom, was with him at the time (Barrett: T. 44; Engstrom: T. 228).

Bissett drove the group in his van to Gerard's home near 242nd Street. They went inside, watched the Yankee baseball game on television and drank some beer (Barrett: T. 44, 45, 101; Murphy: T. 162; Engstrom: T. 228-29). After a while, Engstrom decided to go home because she had to attend school the next day. Barrett also left and walked her part of the way to her home on Bailey Avenue (Engstrom: T. 230-31, 241). He then returned to watch the rest of the game with his friends (Barrett: T. 136).

When the ballgame ended between 11:30 and midnight, Bissett, Murphy and Barrett left Gerard's home and drove in Bissett's van to "Scotty's" a bar on East 255th Street and Bailey Avenue (Barrett: T. 45-47, 102, 136; Murphy: T. 162-63). They drank a few beers, played pool, and talked (Barrett: T. 46; Murphy: T. 163). At about 4:00 a.m., when "Scotty's was closing, the three young men drove to an "after-hours club" located on East 231st Street, near Albany Crescent, next door to a bar called the "Piper's Kilt" (Barrett: T. 47; Murphy: T. 164). They arrived there between 4:30 a.m. and 5:00 a.m. (now the morning of September 22, 1982), and Bissett parked his van on the corner of Albany Crescent and East 231st Street (Barrett: T. 54-57, 105; Murphy: T. 165-66; see Exhibit 3 [photo showing location of club and where van had been parked]).

When the young men entered the after-hours club it was relatively quiet, with only a handful of people present, including the club's manager Robert Safian, the club's blackjack dealer Michael Belloise, another employee named Cathy Willett, as well as patrons Arthur Fuhst[4] and a woman named Diane (Barrett: T. 48-49; Murphy: T. 166; Safian: T. 538-39; Belloise:

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[4]In the trial transcript, Fuhst's name appears incorrectly as "Faust".

T. 558). The club itself consisted of a bar on one side, a small gambling area with two blackjack tables on the other side, and bathrooms at opposite corners of the back wall (Barrett: T. 48; Safian: T. 527-28, 545-46; see Exhibit 39 [floor plan of club]).

Bissett and his friends went to the bar and began to drink beers. Bissett and Murphy became engaged in a friendly arm-wrestling match, making nose and acting a bit boisterously (Barrett: T. 49, 105; Murphy: T. 166; Safian: T. 532). After some time, Belloise, who had been dealing blackjack to Fuhst and Diane, went over to the arm-wrestlers, who he thought were drunk, and asked them to stop. They immediately complied (Safian: T. 536-37; Belloise: T. 544, 579).

Shortly thereafter, petitioner, Sheila Ryan DeLuca[5] and a friend, Karyn Travelina, entered the after-hours club (Barrett: T. 50, 133-34; Murphy: T. 167). Petitioner, a heavy-set woman with dark blond hair, was wearing jeans, a green sweater and sneakers (Barrett: T. 110; Eberhardt: T. 338-40; Exhibits 14, 15, 16 [jeans, sneakers, sweater]). Petitioner and Travelina had stopped in earlier that night for about "two minutes," at approximately 1:00 a.m., but had left after seeing that "nothing was going on" (Safian: T. 529-30). Although neither Barrett nor Murphy knew petitioner or Travelina, Bissett struck up a conversation with them (Barrett: T. 50-52; Murphy: T. 167-68; Belloise: T. 542-43, 548). Bissett spoke with petitioner at Belloise's blackjack table, while Barrett and Murphy continued to talk at the bar (Barrett: T. 50, 52).

At approximately 6:30 a.m., Bissett, Barrett, Murphy, petitioner and Travelina left the after-hours club together (Barrett: T. 53-54; Murphy: T. 169; Belloise: T. 550). As petitioner was walking out, Belloise, from a distance of about

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[5]The 42-year-old petitioner had formally retired from the New York City Police Department six weeks before, on August 6, 1982, after fifteen years of service (Dugan: T. 717).

seven feet, heard petitioner say to one of the three men, "that he shouldn't have called her girlfriend a dyke" (Belloise: T. 550, 566). At the same time, Travelina seemed upset. The young men laughed it off and then exited (Belloise: T. 551, 566). Outside, they could see that the sun had already come up on the morning of Wednesday, September 22, 1982 (Barrett: T. 54).

When they emerged from the after-hours club, Barrett and Murphy walked directly across the street to Bissett's van while Bissett remained to speak with the women (Barrett: T. 54; Murphy: T. 169). Then, Bissett, too, crossed the street and unlocked his van so that Barrett and Murphy could enter (Barrett: T. 57; Murphy: T. 222). Bissett told them to wait there for his return and he would be right back (Barrett: T. 61; Murphy: T. 169).

Apparently, at about the same time, within five or ten minutes of having left the after-hours club, petitioner went back inside to use the ladies room (Safian: T. 535; Belloise: T. 552, 567). When she came out of the ladies room she stopped at Belloise's blackjack table, where Arthur Fuhst and Diane were still playing (Belloise: T. 552). Safian was not present, since he was in the back room doing some work (Belloise: T. 554). After either Fuhst or Diane said something to petitioner, Belloise heard petitioner say, "I'm an ex cop and these guys better not fuck with me because I'll kill them" (Belloise: T. 552, 569).[6] Belloise took

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[6]Testifying before the grand jury only three weeks after the incident, Belloise reported the statement somewhat differently. Belloise did not testify that DeLuca had said anything about killing anyone; instead, he told the grand jury: "After she used the bathroom she came out and she said to nobody in particular -- I don't know if anyone knew her -- in general she just said that she was an ex cop and the guys outside better not fuck with her because she wouldn't take any shit from them and she might get them back or something." (Belloise: T. 561). Belloise explained at trial that he later approached the

(continued...)

the comment to be "a bravado type of thing, sort of like a macho statement" (Belloise: T. 582). Petitioner then went outside (Belloise: T. 553).

After speaking to his friends, Bissett left them in his van, crossed the street and got into the back seat of petitioner's blue Cadillac. Petitioner and Travelina were sitting in front (Barrett: T. 59-61; Murphy: T. 169; Belloise: T. 553-54). Petitioner then drove the car away (Barrett: T. 59-61; Murphy: T. 171).

Approximately twenty minutes to a half-hour later, petitioner and Bissett returned to the corner where the van was parked without Travelina (Barrett: T. 61: Murphy: T. 171-72). Petitioner pulled her car alongside the van and Bissett, who was not in the front passenger seat of the Cadillac, told Barrett and Murphy to get out of the van and get into the back seat of the Cadillac, which they did (Barrett: T. 61-63; Murphy: T. 172). They remained there, sitting in petitioner's car, for about fifteen minutes, passing around some "sparkling wine" which petitioner and Bissett had been drinking. They were all "having a good time * * * just talking back and forth, just laughing" (Barrett: T. 63-64; see also Murphy: T. 172-73, 187).

Leaving the van parked on the corner of East 231st Street and Albany Crescent, petitioner and the three men began driving around (Barrett: T. 65; Murphy: T. 173). Petitioner and Bissett "seemed to sort of hit it off," and the two men in the back seat were then "sort of left out of the conversation" (Murphy: T. 173). As they were being driven around, both Barrett and Murphy slipped off to sleep (Barrett: T. 65; Murphy: T. 173-74). At one point, Barrett awoke and Bissett gave him money, which he used to buy beer in a "superette" on Fordham Road (Barrett: T. 66-67; Murphy: T. 174). Everyone was still in a "cheery

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[6](...continued)
prosecutor, sometime after his grand jury testimony, to inform him that petitioner had actually used the word "kill." (Belloise: T. 579).

good mood," and, with petitioner remaining behind the wheel, they continued their drive through the streets of the North Bronx, which were now becoming crowded with people on their way to work (Barrett: T. 66-67).

At 8:30 a.m., Helen Bissett was awakened in her bedroom when she heard her son and a woman in the house (H. Bissett: T. 296-97, 305). From her bedroom, Mrs. Bissett could not see them, but she did hear them speaking in a low tone as they came in the entrance foyer. Mrs. Bissett heard the woman say, "'nice apartment,' maybe other words to that effect" (H. Bissett: T. 299, 305). Bissett entered his mother's bedroom and she asked him who the unseen visitor was. He responded, "She had to go to the bathroom and then I'm going to take her home" (H. Bissett: T. 296). Mrs. Bissett heard the sound of a toilet flushing (H. Bissett: T. 297, 301). Before leaving, Bissett asked his mother for some money to buy paint, and Mrs. Bissett gave her son a blank check (H. Bissett: T. 296, 300). Bissett gave his mother a kiss, and then he and the woman left the house (H. Bissett: T. 301).

With petitioner at the wheel, the group continued to drive around while drinking more beer (Barrett: T. 124-25; Murphy: T. 175). The three men also smoked marijuana (Barrett: T. 124-25; Murphy: T. 175). After they bought beer they head toward the Bronx Park Motel, located on Fordham Road and Crotona Avenue. (Barrett: T. 68; Murphy T. 175). They arrived at 10:00 a.m., and Bissett entered the office where clerk Albert DeStasio and manager Morris Green had him register for a room (DeStasio: T. 257; 262-63; Green: T. 273-74). Bissett, indicating that he would be there for a "short stay," requested a room with a waterbed and asked for an x-rated movie (DeStasio: T. 262-63).

Bissett returned to the car and petitioner drove to the parking area near the rented room (Barrett: T. 69, 98). When they arrived, Bissett gave Barrett and Murphy the room key and told

them to go inside, which they did (Barrett: T. 70; Murphy: T. 176). Bissett remained in the car with petitioner, while the two other men began to watch x-rated movies and drink beer (Barrett: T. 70, 99; Murphy: T. 176).

After approximately fifteen or twenty minutes, Bissett came to the door with petitioner and asked the other two men to leave the room. Barrett and Murphy immediately picked up their beers and left the room as Bissett and petitioner entered (Barrett: T. 72, 139, 143; Murphy: T. 176-77). Within a few minutes Murphy and Barrett became angry because they wanted to go home and were left standing in the parking lot outside of the motel room. They began to bang on the door, calling, "let's go," and Murphy kicked a window, breaking it (Barrett: T. 72-74: Murphy: T. 177-78, 196). Bissett came to the window, looking a "little angry," and so the other two men took their beer with them and left on foot (Barrett: T. 74-75; Murphy: T. 178). Neither Barrett nor Murphy had seen any gun during the time that they were present (Barrett: T. 78, 110; Murphy: T. 181).

Meanwhile, as all of this was going on, the motel manager, observed what was taking place and directed the clerk to call the room and ask the occupants to leave (DeStasio: T. 264-66; Green: T. 276-78). In response to this call, as Murphy and Barrett were walking from the motel's parking lot, petitioner and Bissett left the motel room and got into petitioner's car (Barrett: T. 75, 150-51). Before they drove off together, Bissett briefly returned to the motel room, as if he had forgotten something, while petitioner waited for him in the car, behind the wheel (Green: T. 278-79).

Barrett and Murphy walked five blocks to some benches outside the Bronx Botanical Gardens, where they drank more beer (Barrett: T. 76, 80-83; Murphy: T. 178). Then, both men boarded a bus and ultimately separated when Barrett continued on to a garage in Riverdale where he and Bissett had planned to

meet before a painting job scheduled later that day (Barrett: T. 76, 86; Murphy: T. 178, 215).

Sometime during the morning of September 22, Bissett stopped in at the "Blue Store," a paint store located on Broadway, between East 231st and East 232nd Streets, where he paid the owner, William Lipton, for an outstanding bill (Lipton: T. 633-35, 637, 641). Bissett used the blank check given to him earlier that morning by his mother (H. Bissett: T. 300; Lipton: T. 635; Exhibit 9 [check used by Bissett to pay for paint]). Bissett had a brief, "friendly" conversation with Lipton, and did not appear to be drunk or "high" (Lipton: T. 637).

After leaving the paint store, Bissett apparently returned to his van, which had been left at the corner of East 231st Street and Albany Crescent. Patricia Engstrom, who lived a block away from that corner, had noticed the parked van at about 8:30 a.m. as he passed it on her way to school (Engstrom: T. 231-32, 244). Donald Lavan, Bissett's brother-in-law, had seen the van parked there continuously between 7:30 a.m. and 10:50 a.m., while he was having his usual daily breakfast at the "Piper's Kilt," across the street (Lavan: T. 409-14). Latter, as Engstrom and her friend Joanne McCabe passed the corner on their way home from school, the van was still there (Engstrom: T. 237-38; McCabe: T. 497-98). However, when Engstrom and McCabe passed by again at 1:15 p.m., the van was gone (Engstrom: T. 239-40; McCabe: T. 498).

Sometime between 1:00 p.m. and 1:30 p.m., a team of workers from the New York City Department of Water Supply, consisting of foreman John Simeone, machinist helper Stanley Berman, and laborer Carl Oliveras, arrived at an area alongside the service road of the Major Deegan Expressway, just north of Fordham Road. The crew was there because a nearby water-main break on Fordham Road required them to check local hydrant pressure and other water gates (Simeone: T. 362; Oliveras: T. 673).

One of the workers' trucks descended a "ramp" into a gulley-like, relatively desolate area, at the bottom (Simeone: T. 361, 363; Berman: T. 382, 385, 397-98; see Exhibit 13 [aerial photo of area]). Near the bottom of the ramp, about twenty-five feet away from where they parked their truck, they observed Bissett's black Ford van parked in the middle of a large pool of water, a number of inches deep (Simeone: T. 363-64; Berman: T. 387-88).[7] Also nearby was a large Department of Sanitation "front end loader," a heavy duty construction machine, being operated by Basil Meola (Berman: T. 388; Meola: T. 652-53). The Department of Water Supply truck was closer to the van than the Department of Sanitation vehicle (Meola: T. 662-63). Because the front end loader had a diesel engine, and because of the nearby highway truck traffic, the noise level in the immediate area was fairly high. However, the Department of Water Supply crew could here each other's conversation as they spoke in their truck (Berman: T. 388; Meola: T. 652; Oliveras: T. 682).

Watching the nearby van, the Department of Water Supply crew noticed that it was moving around and bouncing up and down. They joked that, "somebody was getting laid in the van" (Simeone: T. 366, 378; Oliveras: T. 671, 673).[8]

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[7] According to the police officers who arrived at the scene a few hours later, the van was parked in a pool of water having approximately a twenty-five to fifty foot diameter and having a depth of between two inches and five inches (Baldassarri: T. 316, 319; Cota: T. 328; Taylor: T. 794).

[8] While this was going on, a man parked a bright red car at the top of the ramp and walked down toward the van, but then turned away and walked in a different direction (Berman: T. 389-91). In addition, Meola saw a man with a "full head of hair" in the area (Meola: T. 659-60). After the incident, the Department of Water Supply crew and Meola were shown a photo array

(continued...)

At about 2:00 p.m., Carl Oliveras was still in the water supply truck near the van, while Stanley Berman and John Simeone were further up the ramp, checking pressure on a hydrant (Simeone: T. 369-70; Berman: T. 394; Oliveras: T. 673, 678). Oliveras looked up and noticed a heavyset woman with dark blond hair, who looked tired, walking up he ramp, away from the van, toward the other crew members and Fordham Road (Oliveras: T. 674, 676, 678). Berman and Simeone also noticed the woman, as she approached and then walked right by them, turning left onto Fordham Road (Simeone: T. 369-70; Berman: T. 394). None of the workers had heard any shots (Berman: T. 404; Meola: T. 666; Oliveras: T. 683-84). Nor could any of them identify the woman as petitioner (Oliveras: T. 674-75; Simeone: T. 369-70; Berman: T. 394-95).

At approximately 10:50 a.m. on the morning of September 22, Ann O'Byrne, an exchange student from Ireland who had spent the summer working in the United States, went to "Pauline's" bar in the Bronx, owned by her aunt Pauline O'Sullivan, where she met Karen Travelina (O'Byrne: T. 863, 866).[9] O'Byrne worked as a house cleaner for petitioner once a week and this was her cleaning day (O'Byrne: T. 864-65, 867-69). Travelina, who appeared to be drunk, offered to drive O'Byrne to the DeLuca home, located at 312 West 260th Street (O'Byrne:

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[8](...continued)
containing Mr. Peter DeLuca's picture, but none of the workers identified him as having been in the area (Taylor: T. 811-13).

[9]On the previous evening, O'Byrne had been at a party at Pauline's to celebrate the winning of a league championship by the drinking establishment's women's softball team. Petitioner had been there with her husband and Travelina. When O'Byrne left the party at 10:00 p.m., all three were still there (O'Byrne: T. 865-66).

T. 864, 866-67). O'Byrne reluctantly accepted the officer (O'Byrne: T. 866-67).

When they arrived, O'Byrne went in to see if petitioner "was * * * up yet" (O'Byrne: T. 868). She was greeted in the living room by petitioner's husband, Peter DeLuca, a retired New York City Police Department Captain, who initially informed her that petitioner was not yet awake (O'Byrne: T. 868). Travelina left and O'Byrne had a cup of coffee with Mr. DeLuca, at which time he informed O'Byrne that, in fact, petitioner had been out all night long, and had not yet returned home (O'Byrne: T. 868).

O'Byrne began to do her housework at about 11:20 a.m., when the phone rang. Mr. DeLuca answered the call and then told O'Byrne that he was going out (O'Byrne: T. 868-69). He returned at 12:15 p.m. and stayed for a few minutes, but then left again to buy a few grocery items. He returned with some packages from the store at about 12:40 p.m. (O'Byrne: T. 869).

Shortly thereafter, the telephone rang again. When Mr. DeLuca answered it, O'Byrne heard him say, "What's wrong with you now" (O'Byrne: T. 870). O'Byrne did not listen to the rest of Mr. DeLuca's conversation, but when he finished he told O'Byrne that "he was going out looking for Sheila" (O'Byrne: T. 870). He left the house at about 1:00 p.m. (O'Byrne: T. 870).

At approximately 1:30 p.m., O'Byrne received a telephone call from Mr. DeLuca "to see [whether] Sheila [had] called or * * * come home yet" (O'Byrne: T. 870). When O'Byrne informed him that she had not heard from petitioner, Mr. DeLuca said, "If she calls or comes home, tell her I'm on my way back." He arrived home five minutes later (O'Byrne: T. 871). He told O'Byrne that he had been "everywhere looking for Sheila, down by 207th Street by the Mobil gas station"

(O'Byrne: T. 871). At about 1:45 p.m., Mr. DeLuca again drove off in search of his wife (O'Byrne: T. 871).[10]

At approximately 2:20 p.m., O'Byrne was cleaning the living room, from which she could see the road and the garden outside, when petitioner drove up in her blue Cadillac and pulled into the driveway (O'Byrne: T. 874). "Almost immediately afterwards," Mr. DeLuca pulled up in his tan Ford (O'Byrne: T. 874). O'Byrne noticed that "[t]hey stayed talking in the garden for a few minutes." Then petitioner entered the house (O'Byrne: T. 874).

When petitioner entered her house alone, she immediately went to her bedroom and removed the jeans, sweater, and sneakers that she had been wearing, replacing them with a bathrobe (O'Byrne: T. 875, 879). After changing her clothing, petitioner emerged from her bedroom and told O'Byrne to go downstairs and clean the basement. As petitioner was giving these instructions, Mr. DeLuca entered the house (O'Byrne: T. 876). Subsequently, from the basement, O'Byrne heard the DeLucas, who were in the living room above, speaking in high-pitched tones. O'Byrne had never been able to hear them in the past when she cleaned the basement (O'Byrne: T. 876-77).

At approximately 3:45 pm., O'Byrne finished her cleaning work and returned to the living room, where she sat between the DeLucas on the couch and drank coffee (O'Byrne: T. 877). O'Byrne noticed that Mr. DeLuca "wasn't his usual self at all" in the living room, and that he "didn't say much" (O'Byrne: T. 882). O'Byrne also noticed that he was still wearing the same

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[10]When Mr. DeLuca left the house he was wearing a light jacket of raincoat material. The car he drove was an old tan Ford (O'Byrne: T. 872-73). As previously noted, his photo was shown to the Department of Water Supply crew, and the Department of Sanitation Workers, and none of them identified him as being at the worksite where they saw the van in the pool of water. See supra n. 8.

clothing that he had worn earlier in the afternoon, and that the clothing was dry, with no indication of water or mud on the pant legs (O'Byrne: T. 878).

They all spoke briefly about gambling in Atlantic City, where O'Byrne was planning to go with her aunt that Friday. Mr. DeLuca was reading an article in the newspaper about "an after hours gambling place," and suggested to his wife that she read it while he was driving O'Byrne home (O'Byrne: T. 877). Mr. DeLuca then left the house with O'Byrne at about 4:30 p.m. and drove her home in his tan Ford (O'Byrne: T. 878).

Shortly before 7:00 p.m. on the evening of September 22, Detective Martin Baldassarri of the 46th Precinct Detective Unit received a telephone call from Peter DeLuca, in which Mr. DeLuca stated that the police would find a body in a van located near the Major Deegan Service Road and Fordham Road. Giving his name, phone number and address, Mr. DeLuca stated that after they found the body, the police should see him and he would tell them about it (Baldassarri: T. 314). Detective Baldassarri took down the information, but told Mr. DeLuca that the 46th Precinct did not cover the area where the van was located (Baldassarri: T. 314).

Between fifteen and thirty minutes later, Detective Baldassarri's partner, Detective Ronald Cota, received a similar call from Mr. DeLuca (Baldassarri: T. 315, 322; Cota: T. 325-26). Although Detective Cota told DeLuca that this matter fell within the jurisdiction of the 52nd Precinct, the two detectives decided to go to the location and investigate anyway (Baldassarri: T. 315; Cota: T. 325-26).

The officers arrived at the scene between 7:20 and 7:30 p.m. in the evening. Bissett's van was still parked in the large pool of water where it had been seen by the Department of Water Supply crew earlier in the day (Baldassarri: T. 316, 319; Cota: T. 328-29). The driver's door was open and the windows were down (Baldassarri: T. 317; Cota: T. 327; Taylor: T. 794). When

the detectives looked inside the van they say Bissett's fully clothed body, shot four times in the head, slumped between the two front seats, face down, looking as if he had been coming from the rear of the van when he was killed (Baldassarri: T. 317; Cota: T. 326; Taylor: T. 793-94; Eberhardt: T. 336; Exhibits 31, 32, 33, 34 [photos]).

The detectives then called for officers from the 52nd Precinct (Baldassarri: T. 320-321; Cota: T. 327). Detective Cota spoke with Detective George Taylor of the 52nd Precinct Detective Unit, who went to the scene with his partner, Detective Joseph Fusilli (Fusilli: T. 424; Taylor: T. 793). They viewed the van and Bissett's body (Fusilli: T. 424; Taylor: T. 793-94). Uniformed Police Officer Peter Flynn arrived soon thereafter. He was assigned to guard the scene during the course of the investigation (Flynn: T. 721). Bissett was formally pronounced dead at the scene by an ambulance attendant (Flynn: T. 726).

Detective Kenneth Kuhn of the Police Department's Crime Scene Unit arrived at the van at approximately 9:00 p.m. (Kuhn: T. 452, 454). He took a number of photos of the vehicle and Bissett's body, from various angles, noticing that the interior of the van, both the floor and sides, was carpeted (Kahn: T. 454-55, 463; Exhibits 30-34 [photos]). He also recovered two partially deformed bullets from the interior of the van. One was found in the rear section, and the other was found under Bissett's head. These bullets were given to Officer Flynn who vouchered them (Kuhn: T. 455-56; Flynn: T. 722-23; Exhibits 35, 36 [bullets]). Officer Kuhn also recovered three bottles of Riunite wine from the rear of the van.Two of the bottles were still in the paper bags in which they had been sold (Kuhn: T. 457, 461; Exhibit E [bottles]).

Meanwhile, at approximately 8:00 p.m., Sergeant Richard Pilney, desk sergeant at the 52nd Precinct, also received a telephone call from Mr. DeLuca, who informed Sergeant Pilney that "he had information regarding the man that was dead in the

van and he wanted to speak to the detectives" (Pilney: T. 690-91).[11] Minutes later, Mr. DeLuca called once again and stated that the man in the van had raped his wife at approximately 1:00 p.m. that day, and that he wanted to speak to someone from the "Rape Squad" (Pilney: T. 692). At 8:15 p.m., Sergeant Pilney informed Sergeant Rudolph Eberhardt of the Bronx Sex Crimes Squad of this report (Eberhardt: T. 332; Pilney: T. 693).

After being briefed by Sergeant Pilney about Mr. DeLuca's telephone calls, Sergeant Eberhardt telephoned Mr. DeLuca at his home. Mr. DeLuca immediately put his wife on the line (Eberhardt: T. 332). Petitioner identified herself and told Sergeant Eberhardt that she had been at "Pauline's" the night before celebrating her birthday and the women's softball victory (Eberhardt: T. 332). Petitioner stated that Mr. DeLuca also attended the party, but left early, and that petitioner later went to play blackjack at the after-hours club located on East 231st Street and Albany Crescent, where she parked her car on the street outside the club (Eberhardt: T. 332-33). Petitioner told Sergeant Eberhardt that as she left the after-hours club, she was forced into a van by three men and taken to a motel near the Bronx Zoo (Eberhardt: T. 332, 335). There, they watched sex movies until a fight erupted among the three men, each of whom wanted to "have an affair with her." During the fight, a motel-room window was broken (Eberhardt: T. 333, 348).

Petitioner told Sergeant Eberhardt one of the men subsequently forced her into the van and took her to the vicinity of Fordham Road and the Major Deegan Expressway where he raped her (Eberhardt: T. 333). Petitioner also told Sergeant Eberhardt that she finally made her getaway when she managed to hit the man on the head with a bottle, causing him to roll over,

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[11]Since Sergeant Pilney was hospitalized at the time of trial; pursuant to situation, his grant jury testimony was read to the jury (T. 689; Exhibit 42 [transcript]).

and that he was lying in the back, bleeding, when she left the van (Eberhardt: T. 333, 350). Petitioner went to Fordham Road, where she called her husband at home and told him where she was (Eberhardt: T. 333). When her husband failed to show up, she walked back to her car and rove home (Eberhardt: T. 333, 351). Petitioner then told Sergeant Eberhardt that she did not wish to say anything more without a lawyer present (Eberhardt: T. 33, 350). After speaking with petitioner, Sergeant Eberhardt went to the scene of the homicide and viewed Bissett's body inside the van (Eberhardt: T. 335-36). From there he went to petitioner's house (Eberhardt: T. 336-37).

The first police officers to arrive at petitioner's home, at approximately 8:45 p.m., where Detectives Taylor and Fusilli from the 52nd precinct. Mr. DeLuca introduced himself as a retired police captain, and his wife as a retired police officer (Fusilli: T. 424-25; Taylor: T. 795, 825). Almost immediately, Mr. DeLuca announced that he had no guns, and shortly thereafter stated that "the bum in the truck down there raped my wife this afternoon." Petitioner said nothing (Taylor: T. 795, 843).

A few minutes later John Patten, the DeLucas' attorney, telephoned and told Detective Taylor that he did not want his client speaking to the police prior to his arrival (Taylor: T. 795).[12] After that, no further efforts were made to interview the DeLucas about the homicide. Sergeant Eberhardt and a Detective Roman from the Sex Crimes Squad arrived at the house, but did nothing until counsel was present. When Patten arrived, he announced that he would not allow any questioning of petitioner or her husband, but asked that the rape investigation proceed.

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[12]Petitioner's trial counsel apparently wanted the jury to be aware that petitioner and her husband refrained from speaking to the police on advice of counsel (See T. 354-55, 827).

On advice of counsel, petitioner handed over the clothing she had been wearing September 22 and the previous evening, which consisted of the blue jeans, sneakers, a green sweater, and white panties (Eberhardt: T. 338-40; Taylor: T. 796-97; Exhibits 14, 15, 16, 17 [clothing]). Sergeant Eberhardt immediately noticed that the pant legs of the jeans were still damp from their bottoms up to a point approximately nine inches about the bottoms; the sneakers, too, were still damp (Eberhardt: T. 340, 352).

It was then agreed that they would all go to the 52nd Precinct for the purpose of filing a formal rape complaint (Eberhardt: T. 343-44; Fusilli: T. 427; Taylor: T. 797). There, petitioner stated that the three men who abducted her had used a knife (Eberhardt: T. 349). Later, at about midnight, petitioner was taken to North Central Bronx Hospital for a medical examination (Eberhardt: T. 353; Fusilli: T. 428; Taylor: T. 798).

When they finished at the hospital, Detective Fusilli accompanied petitioner back to her home. It had been agreed, with counsel's consent, that petitioner would turn over her guns to the police (Fusilli: T. 428-29; Taylor: T. 798). When they entered the DeLucas' house, petitioner went to the back bedroom while Detective Fusilli sat down with Mr. DeLuca in the dining room (Fusilli: T. 429).

Mr. DeLuca indicated that he was aware that the detective was there to retrieve petitioner's pistols. He then reached over to a nearby hutch and picked up a holstered, off-duty type police revolver which he gave to Detective Fusilli (Fusilli: T. 429; Exhibit 20). Mr. DeLuca told the detective, "This is the gun you're here for" (Fusilli: T. 446). Detective Fusili unloaded the .38 calibre revolver, finding that it contained five spent shells (Fusilli: T. 429, 432, 434; Exhibit 24 [spent shells]).[13] Peti-

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[13]Sergeant Thomas Dugan of the Police Department's Licensing Division

(continued...)

tioner then came out of the bedroom and produced two additional regular-service-type revolvers, which were loaded with a total of eleven live bullets (Fusilli: T. 430; Exhibits 28 [live rounds]). Detective Fusilli returned to the 52nd Precinct with the three pistols, which were vouchered and sent to ballistics (Fusilli: T. 430, 438).

On the following day, September 23, Detective Anthony Lombardo, of the Crime Scene Unit, executed a search warrant authorizing the search of petitioner's blue Cadillac, which was in the DeLucas' garage (Lombardo: T. 589-90, 595, Taylor: T. 799-800). He seized a Budweiser bottled, a Budweiser can, and a Heineken bottle from the back seat of the car (Lombardo: T. 591, 598). He was able to lift a latent fingerprint from the Heineken bottle, which was sent to the Police Lab for analysis (Lombardo: T. 591, 604; Exhibit 37A [fingerprint]). Guillermo Jaramillo, a fingerprint technician for the Police Department, examined the fingerprint lifted from the Heineken bottle and was able to establish that the fingerprint belonged to Bissett's friend, Robert Barrett (Jamamillo: T. 505, 510-11, 513-14).

Police Officer Stephen Colangelo, a ballistics expert, established positively that petitioner's off-duty revolver, which contained the five spent shells, had been recently discharge and

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[13](...continued)
testified that on September 19, 1980, Mr. DeLuca had sold this gun to his wife, and that at the time of her retirement, petitioner preserved her right to possess this off-duty revolver by obtaining a carry license (Dugan: T. 701-07, 711-12; Exhibits 43, 44 [property receipt and license]). Prior her retirement, petitioner used this pistol in March of 1982, to achieve her semi-annual firearms qualification, as required by Police Department guidelines. She shot a score of 90, which Police Officer Frank Genovese, the firearms instructor administering the test, considered to be an excellent score (Genovese: T. 729, 731, 733-34).

was the same pistol that fired the bullets into Bissett's skull (Colangelo: T. 480-83, 490). The pistol was also tested for latent fingerprints by Police Office Philip Saccacio, but none could be found (Colangelo: T. 627, 630-31).

The autopsy on Bissett was performed by Det. Beverly Leffers, Deputy Chief Medical Examiner, who found four close "in and out" bullet wounds in Bissett's head, caused by four separate bullets (Leffers: T. 751, 753-54). The entry wounds were all on the right side of the head. After passing through Bissett's brain, one bullet exited from the back of the head and three exited from the left side of the head (Leffers: T. 754). Dr. Leffers also found gunpowder in the wounds, and evidence of stippling, which indicated that the shots were fired from a distance of twelve to eighteen inches (Leffers: T. 754-56). There was a "very small bruise" on top of Bissett's head, which was consistent with his being struck with a bottle, but it was highly unlikely that such a bruise could have rendered him unconscious (Leffers: T. 759-60, 785-86, 790). Dr. Leffers could not state the time of death with precision because the body had been refrigerated to prevent decomposition and this had altered the progression of signs that appear after death (Leffers: T. 763). Dr. Leffers found evidence of cocaine in Bissett's body (Leffers: T. 787).

Dr. Robert Shaler, Director of Serology for the Medical Examiner's Office, performed tests on a swab of Bissett's penis which showed that Bissett had experienced vaginal and oral sex some time before his death (Shaler: T. 610, 613-18, 620, 625). Dr. Shaler also tested petitioner's panties and found that they contained seminal fluid from a man with type O blood, which was Bissett's blood type (Shaler: T. 618, 621-22, 624).

The Defense Case

At the close of the prosecution's case, petitioner unsuccessfully sought to call an expert witness on rape trauma syndrome in order to rebut the prosecution's contention that petitioner's rape claims were false, and that these false claims evidenced consciousness of guilt. See T. 886-902; see also infra, pp. 96-109. Petitioner thereafter presented no evidence.

POST CONVICTION PROCEEDINGS

Section 330 Motion

On May 15, 1984, petitioner moved to set aside the verdict pursuant to Criminal Procedure Law § 330.30 ("§ 330 Motion"). In that motion, petitioner contended that: (a) the prosecution had failed to establish beyond a reasonable doubt that petitioner was the person who shot the deceased; (b) a new trial should be granted based on newly discovered evidence; (c) the prosecution suppressed evidence favorable to petitioner; (d) the trial court erred in refusing to permit expert testimony on post-rape trauma; and (e) the trial court incorrectly charged the jury concerning circumstantial evidence. Petition ¶ 2; Svetkey Aff. ¶ 4. This motion was denied on May 18, 1984, and petitioner was sentenced as set forth above. Petition ¶ 3; Svetkey Aff. ¶ 5.

Direct Appeal

On appeal to the Appellate Division, First Department, petitioner, now represented by Alan M. Dershowitz, Esq., argued that: (a) the evidence, which was entirely circumstantial, did not exclude to a moral certainty every hypothesis but that of guilt; (b) a new trial should be ordered because of newly discovered evidence; (c) the prosecution failed to disclose the existence of a material witness; and (d) the court committed reversible error in refusing to permit the testimony of a defense expert on rape trauma syndrome. Svetsky Aff. ¶ 6, Ex. 2.

Petitioner's conviction was affirmed without opinion on April 11, 1985. Id. ¶ 7.

Section 440 Motion

On May 3, 1989, petitioner, represented by her present attorney, Mark F. Pomerantz, Esq., moved to vacate her conviction pursuant to N.Y. Crim. Proc. L. § 440.10 ("§ 440 Motion"), raising, for the first time, a claim of ineffective assistance of trial counsel, and for the first time admitting that it was she who shot and killed Bissett. See Svetkey Aff. ¶ 11, Exs. 4-7. Petitioner claimed that she was deprived of the effective assistance of counsel (a) by trial counsel's failure to inform her of the possible defense of extreme emotional disturband ("EED") and counsel's concomitant failure to allow her to decide whether to pursue that defense; and (b) by counsel's failure to inform her of and allow her to make several other strategic choices in the case, including whether to testify and whether to submit lesser offenses to the jury. Id., Ex. 4. Petitioner also claimed that she was deprived of her Sixth Amendment rights by the trial court's refusal to permit her to call an expert witness on rape trauma syndrome.[14] Id. Accompanying petitioner's § 440 motion were an affidavit by petitioner ("Petitioner's § 440 Affidavit"), and the affidavits of her attorney, Mark Pomerantz, Esq., and her personal physician, Dr. William Clyne. See Svetkey Aff., Ex. 4.

Petitioner's § 440 Affidavit set forth her personal account of the events leading up to and following the shooting and dis-

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[14]This claim was raised because the prosecution had argued on direct appeal that petitioner had failed to preserve this claim for appeal, and the Appellate Division had affirmed petitioner's conviction without opinion, thus leaving the record unclear, for purposes of a possible federal habeas corpus action, as to whether the state courts had ruled on the merits of her ineffective assistance claim. See Svetkey Aff., Ex. 7 at 3-4.

cussed the circumstances that led to the strategy pursued at trial. Petitioner claimed that she was brutally abducted and raped by Robert Bissett. She explained that she later shot and killed Bissett in the aftermath of the horrifying assault when she returned to the scene with her husband and the emotions from the earlier attack started to come back to her. In addition, she claimed that her lawyer failed to explain the extreme emotional disturbance defense, prevented her from deciding whether to present such a defense and failed to allow her to decide for herself whether to testify at trial. Svetkey Aff., Ex. 4.

The affidavit of Dr. Clyne corroborated petitioner's claim that she had been assaulted. Based on an examination he performed shortly following the incident, Dr. Clyne specifically remembered several large bruises and several smaller bruises on various areas of petitioner's body, particularly her breasts and thighs. He did not believe these injuries to be self-inflicted. Svetkey Aff., Ex.4.

The prosecution opposed the § 440 Motion, inter alia, on the basis of petitioner's "unjustified failure to raise her present claims at a more appropriate time."[15] Svetkey Aff., Ex. 5, ¶ 14. The prosecution also argued rejection of the § 440 Motion because petitioner had submitted "no evidence to substantiate her newly-raised accusations against counsel," and characterized the motion as "just another transparent attempt to shift the blame, and a last ditch effort to attack her conviction, this time, at the cost of bringing an experienced attorney down with her." Id. ¶ 15.

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[15]Judge Tonetti did not address this procedural default argument, apparently agreeing with petitioner's counsel that "[t]his case plainly falls within the general rule that ineffective assistance claims should be raised in the pose-conviction context" since the claims raised "relate to the inner workings of the attorney-client relationship" and are based on facts that "could not have been a part of the record at trial." Svetkey Aff., Ex. 6,¶ 4.

In order to refute the prosecution's suggestion that the version of the events set forth in petition's § 440 Affidavit was a recent fabrication, petitioner submitted the affidavit of Ellen Yaroshefsky, Esq., an attorney whom Patten had consulted prior to trial.[16] Svetkey Aff., Ex. 6. The Yaroshefsky affidavit corroborated to some extent petitioner's contention that an extreme emotional disturbance defense was not discussed in detail prior to trial. Yaroshefsky's affidavit also confirmed that the account of the events of September 22, 1982, set forth in petitioner's affidavit was fully consistent with the account related to her in discussions with the petitioner prior to trial. Id.

Judge Tonetti denied petitioner's § 440 motion on August 24, 1989, without a hearing. See Svetkey Aff., Ex. 7 (transcript of proceedings before the Honorable Lawrence Tonetti on August 24, 1989). Judge Tonetti rejected plaintiff's claim regarding the preclusion of expert testimony on the ground that the issue had already been decided by the Appellate Division. Id. at 2-3. Judge Tonetti rejected petitioner's ineffective assistance of counsel claim, stating that he had a "specific recollection" of discussion in the robing room about possible defenses, and that he "remember[ed] specifically counsel agonizing over the problem and telling me in the robing room we have not yet reached a decision and finally at the last minute saying, no, she is not going to testify." Id. at 13. Judge Tonetti told Pomerantz, "I find it difficult to really accept the credibility of the affidavit submitted by your client with respect to some of the [discussions] that she contends never took place between her and counsel." Id. at 13-14. Judge Tonetti refused Pomerantz's request for an opportunity to present the testimony of petitioner and her trial counsel, noting that a court may deny a motion without conducting a hearing if "an allegation of fact essential to support the motion is either contradicted by a Court record or

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[16]See infra, pp. 52-55.

other official document or is made solely by the defendant and is unsupported by any other Affidavit or evidence." Id. at 17 (citing N.Y. Crim. Proc. L. § 440.30(4)(d)). The court observed that "[i]n this case the motion is made solely and exclusively by the defendant, unsupported by any other evidence and under these and all the circumstances of this case there is no reasonable possibility that the allegations set forth in this affidavit are true." Id. at 17-18. On December 12, 1989, the Appellate Division, First Department, denied petitioner's application to appeal the denial of her § 440 motion. Petition ¶ 11(d);Svetkey Aff. ¶ 13.

THE TESTIMONY AT THE HABEAS HEARING

A. Petitioner: Sheila Ryan DeLuca

1. Background

Sheila Ryan DeLuca testified that she was educated in Catholic schools from first grade through high school. She attended Bronx Visitation for grade school and Manhattan Academy of Sacred Heart of Mary for high school. After high school, she worked for the phone company while attending night school at Hunter College for a year. After that she entered a Franciscan Order in Peekskill and attended Radcliffe College. H. 10. Two years later, she left the Order and returned to Hunter College to earn a degree in education. H. 10-11. Petitioner began her teaching career as a fourth-grade teacher at a parochial school in Yonkers. She subsequently taught health and physical education at a Bronx high school. She also coached little league basketball and softball. H. 11.

In 1967, Petitioner began working for the New York City Police Department. H. 11, 80. At the Police Academy, she was one of twenty-two women in a class of two thousand. H. 80-81. As part of her training, she had a penal law book and learned how to properly cite crimes. H. 85. She also learned to carry

and fire a gun. H. 88, 90. Her first assignment was teaching in the Youth Division at the Police Academy. Shortly thereafter, she began to work on the Civilian Complaint Review Board where she investigated complaints of police brutality to determine whether a hearing was warranted. H. 11, 102-03. She never actually attended any hearings. H. 103-04. She was an investigator for approximately one and one-half to two years. H. 102.

In 1981 and 1982, petitioner served as a patrol officer, and in that capacity made a number of arrests. H. 87. She responded to potentially dangerous calls, such as shots fired, robberies, rapes, and murders. At times petitioner approached scenes with her gun drawn, but never fired her gun while on duty. H. 101. She once used mace to disarm a knife wielding, intoxicated man. H. 97. During her last year of duty, petitioner worked the midnight to eight a.m. shift. H. 84. When she retired in 1982, she had been a member of the police department for over fifteen years. During her fifteen years with the police department, she was never charged with unlawful use of force or other misconduct. H. 12.

Petitioner, who was fifty-one years old at the time of the hearing, married her husband, Peter DeLuca, in 1975. H. 11, 18. Prior to the September, 1982 incident, Mr. DeLuca had retired from active duty as a police officer after twenty-eight years of service. While a police officer, he had been promoted to Captain. H. 32, 259. Sometime after September, 1982, DeLuca and her husband moved to Florida; thereafter, petitioner frequently returned to New York for trial-related business. H. 52-53. Petitioner testified that she is a lesbian, something her husband was aware of prior to their wedding. H 28-29. He had been married once before and told petitioner that "he didn't care about having a sexual relationship with me, that he wanted my friendship." H. 29. Although petitioner didn't reveal her sexual orientation to her co-workers, DeLuca testified that she in-

formed Patten that she was a homosexual. H. 29, 72. Mr. DeLuca died on June 10, 1984, from lung cancer. H. 13.

2. The Events of September 21 and 22, 1982

On the evening of September 21, 1982, DeLuca and her friends gathered at Pauline's Bar and Grill in the Bronx for a buffet dinner. They were there to celebrate DeLuca's birthday and retirement and the Kingsbridge Women's Softball championship they had won that afternoon. H. 12-13. DeLuca testified that her husband, Peter DeLuca, and a good friend, Karyn Travelina, were among those in attendance. H. 13, 178. She recalled having one or two wine spritzers before taking her husband home at around ten or eleven o'clock. H. 180. Peter DeLuca was having headaches and did not feel up to staying out any longer. However, he insisted that his wife return to the party, since she was the "guest of honor." H. 14. When she returned to Pauline's, DeLuca had one or two more wine spritzers before she and Travelina decided to head out to an after-hours club. H. 18.

DeLuca testified that at approximately 4 a.m. she and Travelina sent to "P&K's," an after-hours bar located in the Bronx on 231st Street between Broadway and Bailey Avenue. H. 14, 182, 188. She ordered a beer, and Travelina ordered a mixed drink. H. 197. While in the bar, they were approached by three men: Barrett, Murphy, and Bissett. H. 14-15. The men began speaking to them, and offered to buy them drinks. DeLuca and Travelina were polite, but stated that they already had drinks. The three men responded by calling the two women "dykes" and "lesbians." DeLuca overheard their remarks and reproached them, saying "you don't know us. You don't know who we are. You don't know what we're about. And I just wish you would leave us alone * * *." H. 15.

DeLuca moved to the black-jack table while Travelina remained at the bar. DeLuca testified that she played cards for

approximately two hours. H. 15. Travelina eventually told DeLuca that she needed to call someone she was supposed to take to work the next day because she was not going to be able to make it. However, she did not want to call from the bar. DeLuca offered to drive her to a phone, but Travelina "positively" did not want that. H. 16. Travelina left the bar at 6:00 or 6:30 a.m., and DeLuca returned to playing cards. H. 16, 199. At approximately 7:00 a.m., petitioner left the bar.[17] H. 199.

When DeLuca left to get into her car, which she had parked on 231st Street, Barrett, Murphy and Bissett accused her. H. 17, 200-01. Bissett said, "We're going to have some fun. Get in the car. Don't say anything. My friends and I are going to have a party. And just do as we say and you won't get hurt." H. 17. They pushed her into the driver's seat, and then pushed the seat-back forward, while she was still seated up front, to allow Barrett and Murphy to claim into the back of her car. H. 200-01. Bissett then went around to the front passenger side of the car and got in beside DeLuca. H. 17-18. Once she was in the car, Bissett or Murphy threatened DeLuca with a knife. DeLuca said that although they "didn't put it up to my face, * * * they had it in their hand." H. 202-03. Thee was then a conversation among the men as to who should drive. DeLuca offered to drive since she was sober, and they all agreed to left her drive. H. 18.

The three men then directed DeLuca's driving by telling her "to turn at various places or make rights, make lefts, through different areas of the Bronx." H. 18. During the ride, Barrett, Bissett, and Murphy began talking about various sexual exploits they had engaged in with other women, which they referred to as "gangbangs." H. 18. The men discussed going up to the country to do what they had one to another woman, including

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[17]DeLuca testified that she was not completely certain about the exact times various events occurred. Most of the times she recalled stemmed from the testimony of other witnesses at her state trial. H. 17.

tying her to a bed "and that type of thing." H. 19. DeLuca did not remember the woman's name, only that they strapped her to a bed. She recalled Bissett asking her, "Wouldn't you like that?" When she did not reply, Bissett then said, "[t]his one is not cooperative like the others," and told her, "I'll have * * * you know, killing is nothing to me, I've done it before." H. 19. The other men just laughed. H. 19. DeLuca recalled that the men smoked marijuana and snorted a white powder. H 20-21. It appeared to DeLuca that Bissett was in control.

DeLuca felt as if everything was cloudy. She testified that, "[i]t seemed like it wasn't happening." H. 19. "I felt I was going to be killed, I felt I was going to be raped," she stated. H. 20. She though about crashing the car, but could not bring herself to do that.[18] She saw no police cars while she was driving. H. 20. She recalled stopping to get beer, but she did not remember stopping at a paint store, or stopping at the Bissett home. H. 212, 214, 219-220, 222. She was not aware of how long she drove; she knew only that it "seemed like forever." H. 212. She was "completely terrorized." H. 212-13.

DeLuca continued driving until they reached a motel.[19] Bissett went into the motel office, leaving DeLuca, Murphy, and Barrett in the car. H. 20. When he returned, Bissett directed DeLuca to a parking area. While the other two men went into a motel room, Bissett explained, "this is what it is going to be: we're going to have sex." H. 21. She told him to let her go. He said, "behave yourself, and it will be over soon * * * I don't want to hear you talking above a whisper, just walk into the room and

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[18]Under cross-examination, she testified that the brakes, lights, horn, and power windows on her 1977 Cadillac were all in working condition. H. 216-17.

[19]She thinks it was Bissett who continued to tell her when to turn and where to go, but she testified that her memory wasn't clear. H. 20.

do as I say when you get in there." H. 21. In addition, Bissett stated,"If you don't do as we ask we're just going to kill you." H. 21. DeLuca pleaded that she was "not used to this," and urged Bissett to get rid of Barrett and Murphy because she would be more willing to have sex with him alone. H. 22. Bissett agreed, and he sent the other two out of the room. Barrett and Murphy said they did not want to stand outside for long, and did not want Bissett to have DeLuca all to himself. H. 22.

After Barrett and Murphy left, Bissett made a motion to take DeLuca's top off. When she pulled away, he "smashed her," and said, "I warned you." H. 22-23. The noise level in the room was getting pretty high and the two men outside started pounding on the door. The phone rang and Bissett picked it up. After he hung up, he was "livid * * * just furious at everybody." H. 23. He was using foul language: "bitch, look * * * you said you would * * * if I let the other two guys out, and you went back on your promise." H. 23. To Barrett and Murphy he yelled, "you fucks, you screwed it up." He was visibly and verbally angry. He told DeLuca to get in the car, and said, "if you dare cause me any more trouble again you're dead." H. 24. Barrett and Murphy left the motel on foot, while DeLuca and Bissett drove off again in DeLuca's car with DeLuca at the wheel. H. 233, 237-38.

Although DeLuca was not sure how long she drove with Bissett, she testified that they ended up near Albany Crescent, where his van was parked. H. 241. Bissett had toned down his manner, but he was still angry. DeLuca testified that Bissett "wasn't screaming" anymore, but said "if you just move you're dead, you're dead. Just do exactly as I tell you." H. 25. He threatened DeLuca and told her to get into the back of the van. She did not remember seeing a weapon, but she testified that as she climbed in, he gave her "a good shove." H. 24-26, 244-45. She looked around the inside of the van and saw that there were no doors other than the two in front and the two in the very

back. There was no door handle on the front passenger door. The dashboard, floor, and walls were all carpeted. H. 25-26.

Bissett climbed into the driver's seat and drove for an undetermined period of time. DeLuca remembered that the trip was shorter than when she had driven to or from the motel. H. 245-46. Bissett drove to a location beside the Major Deegan, off Fordham Road, into an abandoned park area. H. 26. There, Bissett punched DeLuca several times and then forced her to have oral sex. He then threw her down and attempted anal sex, but "it just didn't se[e]m to be working out for him." H. 27. Finally, he forced her to have vaginal sex. "He was on top of me for a long time," she stated, "and then he just became still and didn't move." H. 27. At this point, DeLuca grabbed a bottle that was in the back of the van and struck Bissett on the head. While Bissett lay unconscious, she put on as many clothes as she could and climbed out of the front driver's side door. H. 27, 250. She did not have her gun with her and did not believe she hit Bissett hard enough to kill him. H. 27-28.

DeLuca passed behind the van and continued up to Broadway near the elevated subway line, stopping at a gas station. H. 27. From the station, she called her husband to ask him to pick her up, but inadvertently gave him an erroneous address. H. 27. Realizing her error and fearing Bissett would awaken and find her, she left the gas station, proceeding on foot for couple of miles until she reached her car. H. 30.

Once she found her car, she immediately headed home, passing traveling as she drove by. H. 254-55. By this time, Travelina had learned that DeLuca never returned home the night before, and was out looking for her in her car. They waved to each other, pulled over, and Travelina climbed into DeLuca's car. H. 30, 255. DeLuca then told Travelina what had happened, but did not wish to discuss it long. She "just want[ed] to go find [her] husband." H. 31.

As DeLuca turned into her driveway, her husband pulled in right behind her. Mr. DeLuca stated that he could not find her and she explained that she had given him the wrong address. He noticed that the console of her car was out of place and twisted, so he asked if everything was alright. She told him there had been a problem earlier, but that everything was now okay. He accepted her answer because their "relationship was based on trust." H. 31-32. Ann O'Byrne, who came once a week to do light housekeeping, was at the DeLuca home when petitioner arrived. H. 35. Although DeLuca didn't speak to O'Byrne immediately, she did talk with O'Byrne and her husband after she had showered. H. 256-57. During that conversation, DeLuca tried to appear "as normal as I possibly could be." H. 257-58.

DeLuca did not tell her husband about the rape immediately. She "just wanted to forget about everything." H. 32-33. She went immediately into the bedroom, took off her clothes, and got into the shower. Even though she had been awake for over twenty-four hours, she was unable to get any sleep because she was feeling "disturbed." She then went into the living room and spoke further with her husband. Mr. DeLuca asked her where she had been, and she told him about the after-hours bar. He "understood readily," because he knew she liked to play cards. H. 33-34. She tried to act as normal as possible. H. 257.

It was not until DeLuca's husband drove their housekeeper home that DeLuca began to break down. She was crying and shaking. While she was alone in the house she took another shower to calm down and relax. However, this did not work and she wept uncontrollably. H. 35. When her husband returned from driving O'Byrne home, petitioner told him about the rape. She was feeling nauseous and in pain. He wanted to take her to the hospital immediately and report the rape, but she did not want to talk to anybody. H 36. He persisted, however, and "kept pressuring" to the point where he even offered to report the

incident himself if she could tell him where it took place. Fearing venereal disease, DeLuca soon decided that she would go to the hospital. H. 36. Before leaving, she went to her bedroom and got her gun. H. 263-64. She retried the weapon because she "felt so vulnerable" and wanted protection. H. 37.

On the way to the hospital, DeLuca directed her husband to the site of the rape. As they neared the scene, Mr. DeLuca spotted a vehicle and asked, "Is that the van?" Surprised to still see it there, she answered, "Yes." H. 261-62. They got out of the car and approached the van. DeLuca's husband was ahead of her, and he headed around a puddle toward the driver's side of the van. Instinctively, DeLuca went to the other side. H. 38, 266-68. As her husband opened the front driver's side door, DeLuca opened the front passenger door with her gun drawn. They peered into the van but saw no one. Suddenly, her husband yelled, "Get out of there, you son of a bitch!" H. 38, 272. Bissett lunged from the back of the van, up and between the two front seats, shoving Mr. DeLuca away with his left arm. H. 272. As a result, DeLuca's husband "went flying off," out of DeLuca's field of vision. H. 38. Bissett then turned to DeLuca and said, "Bitch, this time you're dead. I'm going to kill you." H. 39. Gun still drawn, DeLuca asked Bissett to "freeze" and said, "stay where you are." H. 272. However, Bissett "made a flying leap," grabbed her upper left arm and began pulling her into the van. H. 39. Standing on the running board of the front door, DeLuca was off balance. H. 277-78. She remembered that she shot more than once, firing as rapidly as she could at his upper body and head. H. 39, 277, 301-02.

Mr. DeLuca appeared from behind the van, stating "I thought you had been shot." H. 278. DeLuca does not know how her husband navigated the puddle located behind the van because Mr. DeLuca wasn't visible to her when he walked behind the van. At the time, she was "visibly upset" and shaking uncontrollably. H. 278. He took the gun from her hand, peered into the

van, shut the door, and walked with her back to their car. H. 279. Although a photograph of Bissett's body, as it was found in the van, shows his right arm tucked underneath his torso, DeLuca maintained that she never touched the body. H. 279-81. DeLuca testified that she and her husband drove home immediately and that her husband called the police. He made several phone calls to various precincts, reporting a body in a van at the location beside the Major Deegan H. 39-40.

DeLuca remembered that the police came to the DeLuca home at some point, and that she spoke to the Rape Squad or Sex Crimes Unit briefly on the phone. H. 41-42. She had no recollection of speaking to the police about the shooting, only about the rape. H. 42. She recalled that Patten and Frank GaNun were retained as her attorneys sometime that evening as well. H. 43. In addition, sometime around midnight, she went to the hospital where she was examined by a gynecologist and a nurse. H. 42-43. That same night, her husband turned over her gun. H. 41-42. On Friday, September 24, DeLuca was arrested shortly after the police requested her surrender. H. 43-44.

3. Discussions with Patten and GaNun

DeLuca told Patten and GaNun about both the rape and the shooting on the night they were retained. H. 45-47. She told them that there were two men with Bissett who could act as witnesses linking her to Bissett on the night in question. H. 47-48. In subsequent meetings with the attorneys, she related her version of the events many times. Her memory faltered initially because he was in shock and "really couldn't function to even piece things together as to what happened." H. 45.

DeLuca remembered explaining her homosexual orientation to Patten, as well as the non-romantic nature of her relationship with her husband. H. 258-59. She also recalled discussions about the forensic evidence: The reddening of, and blood in, her vagina which indicated a sexual encounter had occurred, the

prescription of an abortive drug, the availability of the gynecologist's nurse for testifying, sperm on her pants with the same blood type as Bissett's, her torn underwear, and samples from Bissett's body indicating he had oral and vaginal sex prior to his death. H. 48, 59.

DeLuca had many discussions with her attorneys concerning the defense and whether or not she was prepared and willing to testify. H. 49-50, 72-74. DeLuca felt the jury ought to hear her story and she "absolutely" thought that she would testify. H. 74. However, she did not remember actually making any preparations with her attorneys to take the stand. H. 74. She made Patten aware of her exemplary background and the long list of character witnesses prepared to testify on her behalf. H. 49-52. Patten, nevertheless, explained that he did not want her to take the stand because of the large time gap between the rape and the murder. H. 50.

Patten sought the services of a Rape Trauma Specialist, Flora Coleo, to speak with DeLuca and evaluate her behavior in relation to that of other rape victims. H. 69. DeLuca recalled that Patten hoped to get an explanation for why DeLuca didn't leave the van screaming and why she didn't tell the first person she saw that she had been raped. H. 69. DeLuca recalled speaking with Coleo several times in her office about the rape, but not about the murder. H. 69, 139-40. Coleo was prepared to testify at the trial. H. 69.

DeLuca herself enlisted the aid of Ellen Yaroshefsky, someone she understood to be a constitutional expert with a specialty in rape cases. At the time, DeLuca "was not exactly getting along with Mr. Patten," because she felt he lacked understanding of her circumstances as a woman and as a victim of rape. Since DeLuca believed Patten needed help "with [her] particular feminine situation," she arranged for Yaroshefsky to meet with him. H. 140-42. DeLuca spoke personally with Yaroshefsky on three or four occasions, explaining the events

and requesting assistance with the case. H. 140-41, 295-96. Yaroshefsky offered to provide assistance in trial preparation, but, according to DeLuca, Patten did not desire Yaroshefsky's assistance. H. 296-97.

DeLuca also felt that her husband's assistance was essential. She knew right from the beginning that he wanted to testify and she discussed this fact with her attorneys. H. 50, 52. However, Mr. DeLuca's bout with lung cancer ultimately resulted in approximately six months of postponements before trial. He was initially taking morphine for pain, and he eventually underwent a rhizotomy to sever his nerve endings, a procedure that would have enabled him to testify in April 1984. H. 53-54. DeLuca never suggested to Patten that he make an argument implying that her husband shot Bissett. H. 48, 75. In fact, she did not recall any evidence linking her husband to the crime. H. 49. DeLuca felt that her husband had an "impeccable background" and that he made a good character and eye-witness. H. 52, 54.

DeLuca testified that her husband noticed on September 24 (the day she came home from having spent the night at the hospital and the day she was arraigned) that she was "bruised all over." H. 55. Consequently, on that same day, DeLuca went to see her family physician, Dr. William Clyne.[20] H. 55, 57, 289. At the doctor's office, DeLuca allowed her husband to take photographs of her legs, arms, and chest area. She made certain that both Patten and GaNun were aware of these pictures. H. 56. Dr. Clyne has since died. H. 56, 125.

In an effort to assist Patten and GaNun in the factual investigation of her case, DeLuca attempted to locate potential witnesses. H. 61. Both before and after moving with her husband to Florida, she spoke to many people who might have seen her with the three men on the night in question. H. 70.

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[20]This name appears incorrectly in the transcript as "Kline" and "Klein."

Attempting to trace the whereabouts of Bissett, Barrett, and Murphy, on the night of the encounter led her to two local bartenders with pertinent information. A woman named Sheila Ryan (no relation to the petitioner) told DeLuca that she had refused to let the three men into her bar after she closed up. H. 71-72. Ryan told DeLuca that the three men, all firemen, said they hoped her bar would catch on fire because "it w[ould] be a long time before the fire department arrive[d]." H. 72. A bartender by the name of Andron told DeLuca that Bissett, Barrett, and Murphy were drinking vodka and snorting cocaine in his bar before he asked them to leave. H. 71. DeLuca was certain she made Patten and GaNun aware of these potential witnesses. H. 71.

DeLuca also researched Bissett's background and learned that he had previously attacked another woman. H. 60. A sergeant in the 50th Precinct informed DeLuca of the whereabouts of a young girl who claimed to have been abducted and assaulted by Bissett in a car. H. 63-64. DeLuca did not remember the sergeant's name. However, she tracked down the young woman and her mother. The young woman, Elizabeth Kochovos, executed and signed a written statement for Patten and GaNun. H. 64-65. DeLuca maintained that the young woman's mother was willing and available to testify as well. H 65-66. The mother had withdrawn the police complaint after having received a phone call from Bissett's mother claiming that he wasn't mentally stable. H. 66.

On her own, DeLuca also learned to evidence that Bissett had killed before. She obtained a police report confirming that Bissett had killed someone with a screw driver. H. 67-68. She believed, however, that Patten had told her the case never went before a Grand Jury. H. 68.

DeLuca recalled discussions of two possible defense routes with Patten and GaNun: either taking a plea or an insanity defense. H. 72. She remembered that the insanity defense was

described by her attorneys in the content of a case involving a police officer who shot a child and went away to treatment for less than a year. H. 73. DeLuca did not like the idea of an insanity defense, because she was not crazy. Paten set up an appointment for her to see a psychiatrist anyway. H. 73-74. When Patten abruptly cancelled the appointment, DeLuca made no objection. H. 74.

DeLuca acknowledged that Patten discussed the EED defense with her, but she understood it as part of an insanity defense. H. 72-73, 135-36. She testified that an insanity defense would have been ineffective because "there is no way that I feel that I was insane and I don't feel that anyone could deem me insane." H. 73. Petitioner remembered Patten explaining that if an affirmative defense was put on, DeLuca would have the burden of proof. H. 136.

Although DeLuca testified that at the time of the hearing, she understood that EED would have only reduced her conviction to manslaughter in the first degree as opposed to resulting in an actual acquittal, she stated that she did not realize this at the time of trial. H. 157, 160. DeLuca testified that if she had been informed about EED at the time of trial, she would have testified, regardless of the strength or weakness of the prosecution's case against her. H. 162-63.

A justification defense was also discussed. H. 137. DeLuca testified that Patten communicated to DeLuca several concerns about relying on self-defense as a strategy: 1) the delay between the rape and the shooting; 2) the use of a gun against someone who didn't appear to be threatening DeLuca with a similar degree of force; and 3) DeLuca's ability to retreat. H. 138.

Throughout the trial, as the prosecution presented its case, DeLuca assumed that a defense would be put forth. H. 74-75. The decision not to present a defense was made over lunch, once the People rested. H. 75, 148-49. In her testimony, DeLuca recalled only "the gist" of the final conversation. H. 76. Patten

felt that the District Attorney's version of the events was "crazy" because nobody saw the shooting and there was "no smoking gun." H. 76. He felt that there was not enough evidence to convict DeLuca and that the government had failed to prove its case beyond a reasonable doubt. H. 76, 291-92. Although she was aware that the People's case against her was circumstantial, DeLuca was "surprised" to hear that Patten did not think a defense was required and she was uncomfortable with the decision H. 76, 151.

DeLuca recalled pointing out to Patten that they already had all of their witnesses prepared to go forward. H. 76-77, 149. However, Patten responded by suggesting that the government actually wanted her to testify and would destroy her credibility. H. 77. Patten disliked the idea of presenting only character witnesses, since that would be a "partial defense," leading the jury to ask why DeLuca herself had not taken the stand. Under the circumstances, he felt the sensible thing to do was to rest without presenting any defense. H. 78.

DeLuca remembered just "nodd[ing] in consent" to Paten's suggestions that the case was won. H. 78, 150. She considered it her attorney's decision whether or not she would take the stand. H. 78. She "did not know that the decision was ultimately" hers to make. H. 148. She considered it a joint decision (meaning the defense team's decision), however, as to whether any defense at all would be presented. H. 78. Patten ultimately made the final decision not to call witnesses. H. 79. DeLuca realized that the People's case was full of holes and that if she testified she would be filling in the gaps. H. 156. DeLuca had hope that the holes in the People's case would allow her to walk free, but she was not certain that the possibility was "realistic." H. 157-58.

DeLuca remembered the judge instructing the jury that the "defendant does not have to testify in her own behalf if she does not want to." H. 143. Petitioner vaguely remembered that

during the voir dire Patten told the jurors not to hold it against DeLuca if she didn't testify. H. 146.

DeLuca maintained at the hearing that had she known about the EED defense, she "absolutely" would have put it forward. H. 160-61. She hoped for an acquittal first and foremost, but felt that the EED defense would "just give [her] more incentive to * * * testify." H. 161. According to DeLuca, regardless of how flimsy the People's case was, she wanted to take the stand. If she had known that "extreme emotional disturbance was thrown in as a bonus, as a lesser charge, it would have [only] given [her] more incentive to testify." H. 163.

DeLuca understood that he own testimony was not enough to establish an EED defense. H. 163-64. She acknowledged that she was somewhat relieved when she did not have to testify, since that in turn meant that her husband would also not have to testify. She stated that she would have felt guilty if he felt compelled to testify because he was dying. H. 164-65. The pressure of taking the stand while handling her husband's terminal illness would have been a substantial burden, so she viewed Patten's decision as "a double edged sword." H. 164-65. She never made her concerns regarding her desire to testify known to the trial judge and she does not recall the judge at her sentencing hearing specifically asking her whether she had anything to say. H. 170-71.

At the hearing, DeLuca was shown a coroner's photgraph that had not been admitted at the original state trial. The photograph showed four bullet holes in a neat row across Bissett's head. DeLuca testified that the introduction of this photograph would not change her decision to take the stand at a retrial. H 282-83. Even if she were advised by her attorneys that a jury would reject her story, DeLuca would nevertheless choose to take the stand. H. 286-87. She stated without qualification, "I believe this time I would testify." H. 287.

B. Petitioner's Witness: Ellen Yaroshefsky

1. Background

Ellen Yaroshefsky is an adjunct Professor of Criminal Law at Cardozo Law School, as well as a private practitioner. H. 303. After graduating from Rutgers Law School in 1975, she moved to the state of Washington where she performed work involving the land and fishing rights of a Native American tribe. Shortly, thereafter, she transferred to the Seattle Public Defender's Office where she began specializing in battered women's cases and death penalty defenses. H. 303. After that she was in private practice for two years, where she specialized in defending battered women, and then in 1982, she moved to New York and because a staff attorney at the Center for Constitutional Rights. H. 303-04. By this time, the Center for Constitutional Rights had already developed an expertise in defending women in cases similar to DeLuca's. H. 304.

2. Yaroshefsky's discussions with DeLuca, Patten, and GaNun

DeLuca first contacted Yaroshefsky by telephone and set up an appointment for December 21, 1982. Yaroshefsky testified that she and DeLuca had a total of two or three face-to-face meetings. H. 305. She recalled discussing objective and subjective standards of self-defense during their conversations. H. 308-09. In her testimony, Yaroshefsky explained the combined subjective and objective standard in terms of putting oneself in the defendant's position at the time she acted and determining whether the behavior was objectively reasonable. H. 309-10.

The center for Constitutional Rights' position has been that women should be allowed to act in self-defense according to what they believe would be subjectively rasonable in order to protect themselves. H. 310. After hearing DeLuca recount her version of the events, Yaroshefsky convluded that DeLuca had a self-defense argument because, at the moment she shot Bissett,

she reasonably feared imminent death or danger. H. 310. Yaroshefsky remembered thinking it would help DeLuca's case to have a Rape Trauma Syndrome ("RTS") expert testify. H. 310-11, 320.

Yaroshefsky explained several myths surrounding the behavior of rape victims that could influence DeLuca's case. H. 311. She pointed out that DeLuca's not having reported the rape immediately, gone to the hospital right away, or told her husband at her first opportunity, were reactions common among rape victims that could be explained by RTS. She believed the fact that DeLuca fired more than one shot could be explained by RTS as well. H. 311. Yaroshefsky testified that she had, in fact, used such a defense before. H. 312.

At a restaurant with Patten and DeLuca, Yaroshefsky explained how a self-defense approach might be used in DeLuca's case. H. 313. However, Patten's "focus was on the aspect that he termed premeditation" and Yaroshefsky was not sure whether she addressed his concerns about the time lapse between the rape and the shooting. She personally had no "particular concern" about this issue because she found it "difficult to believe that someone would go back some five or six hours later to the same place and expect the person to be there." H. 313-14.

Yaroshefsky's discussion with Patten concerned women's self defense generally, and the subjective/obejctive standard that she understood to apply in New York. H. 320. There was never any mention of EED. H. 314. The state of Washington had what was called a diminished capacity defense, which Yaroshefsky was most familiar with at that time. H. 321. Washington's defense completely exculpates the defendant, whereas the New York equivalent merely reduces the level of the crime. H. 321. Yaroshefsky specifically remembered suggesting to Patten that a subjective component of the defense needed to be considered. H. 313-14. She also provided him with a packet of materials from the Center for Constitutional Rights designed to assist

lawyers defending this type of action. The packet contained proposed voir dire questions, questions for expert witnesses, and general suggestions abouty how to prepare a defense. H. 313, 315. In addition, she loaned Patten her only copy of a book on women's self-defense. H. 315.

Yaroshefsky specifically recalled that during the course of their communications Deluca expressed some dissatisfaction with Patten and hope that Yaroshefsky would take over handling her case. However, she did not remember that exact nature of DeLuca's complaints. H. 309, 317. Yaroshefsky was unable to take over DeLuca's defense because the Center for Constitutional Rights would not take DeLuca's case. Yaroshefsky, however, did offer her assistance in any way that would be useful to the defense. H. 312, 315-16.

C. Petitioner's Witness: Toni Iovieno

1. Background

At the time of the hearing, Toni Iovieno had known DeLuca for fifteen years. They had became friends while playing on the same soft-ball team. H. 326. After the DeLucas moved to Florida, Iovieno provided DeLuca with a place to stay in New York during the period leading up to her trial. H. 332. Iovieno was an office manager for Irving Kiline Contractors at the time of the incident, but has been working for Federal Express since 1984. H. 325.

2. Iovieno's discussions with DeLuca and Patten

Iovieno first became aware of the incident the day after it happened. H. 326. She called DeLuca from work to confirm plans for a dinner party. Realizing that something was wrong, she left work right away and went to the DeLuca home. H. 326. She remembered that DeLuca appeared to be in a "state of shock, with "very glassy" and "wide open" eyes. H. 327. DeLuca also seemed "very flat emotionally," but kept getting up

and then sitting back down. H. 327. She moved stiffly, as if in pain, and bruises were evident on her arms and chest. H. 327-28. She told Iovieno flatly, "I was raped." H. 328.

DeLuca recounted her story to Iovieno in "dribs and drabs." H. 328. DeLuca told her about how she and Travelina went to an after-hours place to gamble the night before. When Travelina left for the night, DeLuca went out to look for her and three men appeared. Bissett pulled out a knife, pressed it against DeLuca's side, and forced her into the car. H. 329. While in the car, DeLuca was verbally threatened. H. 329-30. In addition, DeLuca informed Iovieno that she had killed a man. H. 341. She explained that she had been to the hospital since the incident, and that her husband was out picking up a prescription for an abortifacient. H. 330.

Iovieno recalled meeting Patten several times in person and also speaking with him on the phone. H. 330, 336. She met him once at her own home when DeLuca was visiting prior to trial. H. 330-32. She remembered asking him questions concerning strategy, Deluca's chances of winning, Mr. DeLuca's health, and potential witnesses. H. 332. At one point, Patten asked her whether Mr. DeLuca would "admit to shooting Mr. Bissett?" H. 333. Iovieno gave a negative reply and refused to speak with Mr. DeLaca about the possibility. H. 333. At a later time, Iovieno asked "when is Shiela going to testify" and Patten said he hadn't yet made that decision. H. 336.

Iovieno also remembered being included in other conversations between Patten and DeLuca, and accompnaying them to court appearances. H. 335. She was always under the impression that DeLuca and her husband would testify. H. 333. She had even sought a hospital bed to install in her home during the time Mr. DeLuca would be in town. H. 333-34. Based on her conversations with DeLuca, Iovieno was certain that DeLuca wanted to testify. H. 338. Having participated in discussions about the role of the character witnesses, Iovieno was under the

impression that Patten was going to put character witnesses on the stand. She recalled no discussions about whose decision it was to have them testify. H. 334.

In all of the conversations she took part in, Iovieno could not recall an EED defense ever being mentioned. H. 337. However, she confessed that she had no formal legal training and that she was unfamiliar with legal defenses. She also acknowledged that she would not have understood what a justification defense meant or recognized that Patten was talking about a justification defense unless he actually used the word justification. H. 339-40.

D. Petitioner's Witness: Flora Coleo

1. Background

Flora Coleo is the Director of the Greenwich House Children's Safety Project, which is a child-abuse prevention and aftercare program, as well as a self-employed consultant. H. 367. Her background and professional credentials are set forth at pages 367-70 of the hearing transcript. She is familiar with RTS and its relations to Post-Traumatic Stress Disorder ("PTSD"). H. 369. She has been called to testify as an expert witness concerning RTS on ten to fifteen occasions and with regard to other issues of sexual assault on approximately fifty-five occasions. H. 369-70. In 1984, at the time of Deluca's state court trial, Coleo was a supervisor and trainer for the Rape Crisis Program, which she founded, at St. Vincent's Hospital. H. 370.

2. Coleo's discussions with DeLuca, Patten, and GaNun

In March of 1984, Patten contacted Coleo by telephone. H. 370. On April 1, 1984, she had an initial discussion with Patten and GaNun outside of their client's presence. H. 371. Before meeting with the attorneys again, she spoke with DeLuca

individually on April 3rd and 7th. H. 376. She recalled meeting with all three together on only one occasion. H. 371.

At the April 1st meeting, she and the attorneys discussed her background and experience, topical literature, their concerns regarding DeLuca's reactions to the incidents, and how to persuade a jury to accept RTS analysis. H. 371-2. Coleo had little recollection of the conversation because Patten and GaNun instructed her to refrain from note-taking out of fear that such notes could be used against their client. However, Coleo did recall that they only spoke of rape and not murder. They explained that she was retained solely to determine whether DeLuca had symptoms consistent with rape, and gave her a hand written list of concerns to address in her evaluation. H. 372, 387. Patten and GaNun wanted her to explain how DeLuca's drinking on the night of the incident related to the events and whether it might affect the jury's acceptance of her story. They also asked her to address why DeLuca did not scream, resist, immediately report the rape, take opportunities to escape, or give an immediate outcry, and why she was seen smiling and appearing unnaturally calm afterward. H. 384.

One focus of discussion, not included on the written list, concerned typical responses to encountering an assailant hours after the initial incident. Coleo explained that the response varies with each individual. Nevertheless, the reaction tends to be a retrauma, taking the victim out of denial. Coleo testified that, "it is often a retrigger for the trauma." H. 383. The shock may cause a victim to fall apart or go into a rage. H. 383. Patten and GaNun instructed Coleo to stay away from details about the crime committed by DeLuca and to avoid discussions about rage. H. 387-88.

At the initial meeting, and again at an April 14th meeting, Coleo and the attorneys spoke about their legal defense strategy, but not about EED. H. 373. She was familiar with EED because one of the cases in which she had testified and which

the three of them discussed in their meetings, had implicated such a defense. H. 373, 375. However, she could not recall at the hearing whether EED specifically came up in that trial or if a different defense was asserted. H. 375. She recalled the attorneys indicating that their defense strategy was to insinuate that DeLuca's husband committed the crime for which his wife was accused. H. 373. Coleo also remembered that they were uncertain whether a RTS expert would be allowed to testify, but seemed to believe that the state could not prove its case in any event. H. 382. They felt that there was a reasonable doubt as to whether or not Mr. DeLuca shot Bisset. H. 373.

Coleo remembered that because the attorneys felt that the prosecution could not prove its case beyond a reasonable doubt, they did not think DeLuca should testify. H. 382. She also recalled that DeLuca wanted to tell the jury her story in spite of the trauma-related emotional difficulties anticipated if she did take the stand. H. 392. According to Coleo, DeLuca felt strongly that she had nothing to hide. However, DeLuca expressed concern that her attorneys would not permit her to testify. The issue was always presented as her attorneys' decision. H. 378. It was Coleo's understanding that the attorneys were setting the strategy; Coleo had no legal training or education leading her to believe that, as a legal matter, a criminal defendant had a right to testify. H. 392-93.

With the exception of the details about the shooting, Coleo testified that Petitioner's § 440 Affidavit was consistent with the story DeLuca related to her in 1984. H. 377. She noted that DeLuca exhibited several specific behaviors common among rape victims as she told her story in those two April 1984 interviews. H. 379-81. Coleo recalled that DeLuca recounted the facts in an extremely "flat" manner. When this observation was brought to DeLuca's attention, DeLuca started to shake slightly and expressed fears with regard to letting herself "fall apart." Coleo described this reaction as one she had "seen for

years among rape victims." H. 379-80. The other indicative characteristics exhibited included: difficulty eating and sleeping; images of the event in her mind; intrusive thoughts; inability to focus her attention; and a lot of time spent controlling her emotions. H. 380.

Based on these interviews, Coleo was to take the stand and explain whether DeLuca's conduct could be explained as a reaction to rape trauma. H. 372, 391. Coleo explained at the hearing that RTS was understood to be a form of PTSD, a series of symptomatic responses to sudden, unexpected trauma. H. 369, 394. Victims of RTS have symptoms consistent with PTSD victims: intrusive memories; torturing oneself with details from the incident; inability to sleep, nightmares; and flashbacks. H. 389, 394-95. Hence, the trauma of rape and other sudden, unexpected trauma, such as killing, are similar. H. 396. The distinction would appear in the specific kinds of images and intrusive thoughts experienced, and whether the victim had subsequent difficulties related to sex. H. 390. Coleo admitted that she could not explain which particular trauma was indicated by DeLuca's symptoms. H. 391. She was not sure how the fact that she was unaware of the murder affected her original analysis. H. 386.

E. Frank GaNun

1. Background

Frank GaNun is a retired New York City Police Captain, and one of two former partners of the Patten and GaNun law firm. He graduated from Fordham Law School in 1963. At the police department, he moved from Detective up through the ranks to Captain. He was a prosecutor in the department trial room, as well as a hearing officer, before retiring from the police department in 1978, H. 398. In September of 1978, he and Patten became partners when they formed Patten and GaNun. Prior to the DeLuca case, GaNun had never represented a murder

defendant. H. 398-99. He did not believe that Patten had ever done so either and was uncertain whether Patten had ever prosecuted a murder case during his employment at the District Attorney's Office. H. 399.

2. GaNun's involvement with the DeLuca case.

GaNun testified that he had not reviewed the trial record of the DeLuca case and therefore had an imperfect recollection of the events. H. 410-11. He also maintained that he played only a secondary role in representing DeLuca, and that his role diminished in importance as the case neared trial. GaNun was a member of a two-member firm and it was "understood" that his partner would control the DeLuca case. H. 429-30. GaNun only saw the afternoon portions of the trial. H. 425, 430. He did not participate in trial preparation. H. 430. He took notes on the initial conversations with DeLuca the night of the shooting and the following days, but he discontinued his note taking after the first couple of meetings. H. 430-31.

GaNun remembered that on the night of the shooting, he got a call from Patten. Patten had received a call from Mr. Patrick Gill, a former associate, indicating that Gill's cousin, Sheila Ryan DeLuca, had been connected with an incident involving a rape and a murder. GaNun proceeded to the DeLuca home, arriving between eight and nine in the evening. Upon his arrival, he met the DeLucas and several police officers who were already present. H. 399-400. He testified that the police presence was due to Mr. DeLuca having already reported the rape and the dead body to various precincts. H. 405. Patten arrived shortly after GaNun. Both attorneys spoke privately with DeLuca, and she told them what happened. H. 400-01.

GaNun recalled DeLuca explaining that the night before the incident she had been to a softball celebration at a bar called "Pauline's." During the course of the evening, she drove her husband home and then returned to the bar. DeLuca, and her

friend, Travelina, then went to an after-hours club to play cards. When DeLuca left the after-hours club, she was kidnapped by three men. After having been driven around the Bronx and taken to the Bronx Park Motel, she was raped in the van. Following the rape, she hit the man on the head with a bottle and left the area. She called her husband, but mistakenly gave him the wrong address, and decided to walk to her car and drive herself home. As she drove into her driveway, her husband pulled in behind her. H. 401.

GaNun remembers DeLuca saying that she waited until after her husband drove the maid home to tell him about the rape. Her prior position as a police officer made her feel too embarrassed to want to report the rape, but her husband felt it was necessary. On the way to the precinct, "as they were driving by the location," DeLuca said something to the effect of "There's the van!" and they pulled up behind it. Mr. DeLuca got out and went to the driver's side of the van as his wife approached the passenger's side. He looked in and DeLuca said, "that's the man that raped me" and at that moment, as Bisset leapt forward, she shot him. H. 402.

On the night of the incident, DeLuca was taken to the precinct at around 10:00 p.m. with the police detectives. H. 405. The police requested that all of the DeLucas' guns be turned over. H. 403. The murder weapon was among the guns picked up, but GaNun could not recall ever having seen a ballistics report. H. 406. He guessed that Mr. DeLuca and the detectives made the arrangements for handing over the guns. H. 403-04.

GaNun recalled that after the interview at the station, DeLuca was accompanied by the detectives to the hospital. H. 407. He also recalled that medical exams of DeLuca were consistent with there having been a sexual encounter. H. 415-16. However, he did not recall specific findings of blood in, and a reddening of, the vagina. H. 416. There may have been discussions about a nurse present at the exam who was available to testify, but he

did not know who she was or with which hospital she was associated. H. 416. He thought that a woman's running suit and, perhaps, a pair of sneakers and white socks were eventually turned over. He seemed to recall a pair of ripped underpants as well. H. 408. He believed there was evidence of semen on DeLuca's clothing, and assumed there was a match with Bissett's blood type. H. 410. He knew DeLuca had suffered bruises because he recalled that her family physician had taken photos several days after the incident. H. 415. He did not recall whether DeLuca's rape statements were offered as false exculpatory evidence by the government. H. 407.

With DeLuca's account of the events in mind, GaNun and Patten had a number of discussions about potential defenses in the months preceding the trial. GaNun remember thinking that Bissett coming toward Deluca just before she shot him, coupled with the earlier rape, might be justification for the murder. He and Patten discussed whether such a justification defense would be presented with DeLuca's own testimony as support. H. 412-13. GaNun did not recall any evidence suggesting Mr. DeLuca was responsible for the shooting. Nor did DeLuca ever suggest to him that her husband had pulled the trigger. H. 411.

GaNun and Patten had no concerns about DeLuca's credibility as a witness. GaNun was aware of her history with the police department and the time she had spent in a convent. H. 413. He was also aware of a number of character witnesses available to support her. He specifically recalled a police lieutenant who was ready and willing to come forward and testify on her behalf. He was also aware that Mr. DeLuca was a credible eyewitness to the shooting, though gravely ill. H. 413-14. Travelina was another available, albeit reluctant, witness who could corroborate her friend's version of events at both bars. H. 435-36. In addition, the attorneys discussed using Coleo as a prospective defense witness. GaNun remembered that she was an expert on rape victims from St. Vincent's Hospital. They planned to put

her on the stand to explain that DeLuca's behavior was consistent with rape. H. 418.

GaNun could not remember whether DeLuca made efforts to track the whereabouts of Barrett, Bissett, and Murphy prior to their arrival at the after-hours club. He did not recall whether any witnesses could attest to their having been kicked out of "Scotty's Bar." Nor did he recall any conversation pertaining to whether Ryan refused to let them into her bar. H. 418-19. He assumed that Barrett and Murphy would testify, but he did not remember discussing the issue with Patten, or the DeLucas. H. 409-10. He did recall information about a prior homicide involving Bissett. Bissett "allegedly had stabbed * * * a cabdriver with a screw-driver, causing the cabdriver's death." H. 419. He also recalled information concerning a prior abduction of a young girl in the Bronx. H. 420-21.

Before the trial began, DeLuca was prepared to testify and GaNun and Patten planned to have her take the stand. H. 423. GaNun believed DeLuca was comfortable with that decision. H. 424. However, the decision about whether or not she should testify was reconsidered at the end of the People's case. Although the shooting actually took place at approximately 7:00 in the evening, the prosecution's position was that the incident took place at noon. With the government so far off base, Patten and GaNun felt that the People had failed to prove their case beyond a reasonable doubt. H. 424-25.

Based on the deficiencies in the prosecution's case, a decision was made not to have DeLuca testify. GaNun could not recall the particulars. He simply remembered that it was the "understanding of the defense" that the prosecution had not proved its case. H. 424-25. GaNun denied, however, that this understanding was specifically his opinion because he was not "involved in this case a hundred percent." H. 425. He testified that he was not present for all of the discussions, and could not say with certainty that he was present at the time the final decision

pertaining to DeLuca's testimony was made. He believed that he participated in a couple of conversations concerning the issue. H. 425-26.

GaNun also believed that the presiding judge shared the defense assessment of the case. He reached this conclusion as a result of conversations in the robing room concerning the information about the prior alleged rape. H. 426. In addition, there were other times during the trial that discussions in the robing room suggested to the attorneys that the judge did not believe the government's burden of proof had been met. H. 426-27. One of those times was when the issue of whether Coleo would testify was discussed. H. 426-27. The judge's general comments gave GaNun the impression that the judge did not believe the case had been proven beyond a reasonable doubt. H. 427. When the defense finally made a motion to dismiss based on their belief that the government had failed to meet its burden, discussions with the judge indicated he was "leaning towards granting it." H. 427-28.

GaNun did not recall any conversations in which DeLuca was advised that she had final authority over the decisions whether or not to testify. Nor did he recall any discussions concerning an EED defense. GaNun testified that he did not believe he was ever a participant in such discussions. H. 428.

F. John Patten

1. Background

John Patten was GaNun's partner in their two-partner firm. Patten graduated from Dickinson Law School in 1969 and was a prosecutor at the Manhattan District Attorney's Office from 1969 to 1974. He then entered private practice with Carmine Peratta on 80 Broad Street from 1974 to 1978. In 1978 he began his partnership with GaNun, handling primarily criminal cases. H. 450-51.

Patten had never tried a murder case before he was retained by DeLuca. He had been in the Rackets Bureau, Complaint Bureau, and Criminal Court Bureau at the District Attorney's Office. The crimes he had prosecuted included perjury, extortion, robbery, and assault, but not homicide. The sole homicide case he worked on involved a police officer tried for perjury and homicide. Many of the cases he prosecuted near the end of his career were police cases. Patten testified that he had tried a total of thirty jury trials as a prosecutor. H. 522-23. At the time he tried the DeLuca case, he had nine years of experience in private practice as well, with an average of three trials a year, for a total of approximately twenty-seven additional trials. H. 524.

2. Patten's Recollection of DeLuca's Story

Patten testified that he had not reviewed the trial record prior to the hearing because it was sent to the appellate attorneys and never returned. H. 526, 528. Nor had he read Petitioner's § 440 Affidavit. His testimony was based solely on his memory of the events surrounding his representation of petitioner. H. 453, 529.

Patten recalled that he and GaNun received a phone call one September afternoon from Patrick Gill, who left a message that he had a relative in some trouble. H. 451-52. Patten and GaNun went to the DeLuca home that night. The DeLucas and some detectives were there. The two attorneys asked the detectives to step outside for a moment so they could confer with the DeLucas privately. H. 452.

Patten remembered DeLuca explaining that she had celebrated her birthday at Pauline's the night prior to the incident. The party broke-up late that night, around one or two o'clock in the morning. H.452-53. DeLuca and her good friend, Travelina, then went to P&K's, an after-hour place. "[T]hree young fellows arrived." Bissett, Barrett and Murphy made unfriendly remarks to DeLuca and Travelina, calling them something along the lines of "dykes." H. 454-55. When Travelina decided to leave,

DeLuca went outside with her, but returned to P&K's to play cards. She remained there until early in the morning. H. 455.

When DeLuca headed out the front door of P&K's as the sun was starting to rise, she was accosted by the men. One of them had a knife, which he put in her side as he directed her to the van. H. 455. They left the van, went to DeLuca's Cadillac, and drove around the Bronx with DeLuca at the wheel. The three men made sexual and threatening remarks and engaged in raucous behavior during this ride. H. 456. Patten did not recall DeLuca stating that the men specifically referred to prior abductions and homicides. However, there was general talk of having done this type of thing before. H. 480-81.

DeLuca was eventually directed to a motel. Initially, all four entered a room. However, DeLuca decided to try to separate the other two men from Bissett. She persuaded Bissett to make the other two leave, but shortly thereafter Barrett and Murphy began banging on the windows to get back in and one eventually broke. H. 456. The motel's manager either called or yelled down to the room at this point, threatening to call the police. Barrett and Murphy departed, leaving DeLuca along with Bissett. H. 457.

DeLuca and Bissett left the motel in her car, with DeLuca at the wheel. They drove back to where the van was parked and switched vehicles. Once in the van, they proceeded to the Major Deegan area, around Fordham Road. Patten recalled that DeLuca had done none of this consensually. H. 457.

Patten also recalled DeLuca telling him that while in the van, Bissett engaged in sexual conduct: first intercourse in the missionary position, then sodomy. Bissett was very high from drinking and using cocaine. DeLuca felt a bottle in the back of the van, grabbed it, and hit Bissett over the head . Once he had passed out, she walked up the service road, across the Major Deegan, and called home from a gas station. Her husband answered and asked where she was. Inadvertently, she gave him

the wrong address. She realized this, and proceeded to her car. As DeLuca returned home, her husband did as well. H. 458.

Patten recalled that DeLuca eventually told him about meeting Travelina on her way home after the rape. However, he was not told about that meeting the first night he spoke with his client. Patten did not specifically recall what DeLuca told him regarding the substance of the discussion the two women had in the car, but he remembered that DeLuca indicated to Travelina that she had no weapon with her the night of the abduction. H. 459-60.

Patten remembered that DeLuca did not say anything about the rape to her husband until after he had driven their maid home. H. 461. When her husband heard about the rape, he wanted to know where it happened. DeLuca said she would show him and she retrieved her gun from the bedroom before they left. H. 461-62.

When the DeLucas arrived at the scene of the rape, they saw that the van was still in the same place it had been parked earlier. Mr. DeLuca walked to the left of the van and opened the driver's door. His wife walked to the right, but Patten could not recall whether she opened the door or found an open window. Suddenly, Bissett leapt up, between the front seats and DeLuca fired. H. 462. The DeLucas drove directly home where Mr. DeLuca called the police regarding the body of the deceased. H. 462-63.

3. Patten's Recollection of the Evidence

Patten remembered that the police were aware that it was Mr. DeLuca who had called to report the rape and the body in the van. H. 465-66. Patten was also aware that the police knew the dead body belonged to the man DeLuca was accusing of rape. H. 468. The police had requested that the DeLucas turn over all their guns. The ballistics test showed that it was DeLuca's gun that had been used in the shooting. H. 463-64.

In addition to the guns, the DeLucas turned over clothing: sneakers, dungarees, a top, and undergarments. H. 464-65. Patten remembered that DeLuca's medical exam, as well as her clothing, generally corroborated her story to the extent that it showed a sexual encounter had occurred.[21] H. 470-71, 480. He did not specifically remember whether there was evidence of a reddening of or, or blood in, DeLuca's vagina. H. 480. Nor did he recall the existence of a semen stain with blood type consistent with Bissett's. He did remember, however, that DeLuca's undergarments had been torn. H. 471. He also remembered that DeLuca went to see a doctor from Riverdale shortly after the incident and that pictures of her bruises were taken which he may have asked the government to admit, along with the doctor's testimony, at the Grand Jury. H. 478-79.

Patten could not recall any physical evidence connecting DeLuca's husband to the shooting of Bissett, nor had anyone indicated verbally that he was responsible. Furthermore, there were no eye witnesses, other than DeLuca herself, connecting him to the scene. H. 472. Neither petitioner nor her husband ever told Patten that Mr. DeLuca would take responsibility for the killing. H. 472-73.

4. Patten Recollection of the Defense

Patten researched the backgrounds of Bissett, Barrett, and Murphy, and he sought character as well as expert witnesses for DeLuca's defense. H. 473-75, 481. None of this information was put forward once he decided, when the prosecution rested, that the government had failed to meet its burden and that his best strategy would be not to present a defense. H. 496, 500.

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[21]Patten believed the rape or sex squad had been called even before he and his partner arrived. H. 466. Patten had petitioner filed a formal rape complaint filed at the precinct in order to get the incident on the record. H. 467-68.

Patten recalled various sources of information concerning Bissett's involvement in prior incidents. The first source was one that DeLuca had found through her own police contacts. A young woman complained of having been abducted by Bissett from a disco late at night. H. 481. DeLuca was directed to find out all she could pertaining to that complaint. Eventually, the young woman was located and executed a signed statement. The young woman's mother explained that she had withdrawn the complaint when Bissett's mother called her and asked her not to pursue the matter. Patten considered having them testify. H. 482.

A second of information regarding prior similar conduct came out of "Jesse James Pub." A bartender there indicated that Bissett and his friends had a reputation for picking-up women late at night and "gang-banging" them. However, that source led nowhere because the bartender would not provide any further information. H. 483-84. Patter was also aware that Bissett was involved in a prior homicide, for which he was arrested, but never indicted. H. 484-85.

Patten had knowledge of DeLuca's background and knew of potential character witnesses. H. 474. He recalled that she was an adopted child, sexually abused as an eight or nine year old by someone who remained in contact with her at the time of the of shooting. H. 489-90. As an adult, she entered a convent where there were allegations that she engaged in homosexual relations with another woman. H. 490. Later, she became a police-woman, and eventually married another member of the police force. Patten described the DeLucas' relationship as a non-romantic, father-daughter arrangement, though he denied she explicitly told him she was lesbian. H. 490, 548. The character witnesses known to Patten were friends of DeLuca's and police officers with whom she worked Nothing suggested that she would be anything but a credible witness. H. 474.

Patten considered DeLuca's husband to be a potential witness as well, but he knew that he was suffering from lung cancer. Patten remember that Mr. DeLuca was taking heavy sedatives, but did not recall that he underwent a medical procedure to sever his nerves and reduce his pain. Patten could not recall any blemish in Mr. DeLuca's background and he acknowledged that he had sought to postpone the trial on the basis of Mr. DeLuca's condition in hopes that he would ultimately be able to testify. H. 475-77. As an eye witness, Mr. DeLuca could back up his wife's testimony concerning her behavior after both the rape and the shooting. He had told Patten that he received a phone call from his wife asking him to pick her up. However , the location she gave him was incorrect. When he returned to the house, he saw her car. There was a paint can and a bottle in the front of her car. H. 532. Petitioner did not initially tell her husband what took place. She made small talk until the maid went home and then she told him about the rape. At this point, Mr. DeLuca insisted they find the location and report it. H. 532-33.

Patten spoke to Travelina with an eye toward using her as another defense witness. She could have corroborated DeLuca's version of the initial meeting with the three men, described the events in the after-hours bar, and testified that she met DeLuca the next day just after the rape. H. 487. This last bit of corroboration would show that DeLuca claimed to have been raped even before Bissett was killed. H. 488. However, Patten had some reservation about letting Travelina testify because she had previously given a sworn statement to the prosecution. H. 519, 536. He was troubled by the fact that only after giving her statement to the government had Travelina told him that DeLuca had not carried her gun with her on the night in question. Patten was concerned about putting a witness on the stand who had made unknown statements to the prosecutor's office. H. 520, 534.

Patten enlisted the services of Coleo, someone he understood to be an expert on rape counseling, to help evaluate DeLuca's behavior. He talked to about "post-rape syndrome trauma" and learned that there was a school of thought beginning to develop recognizing that when women are assaulted they react in a way that may be mistakenly viewed as inconsistent with rape. Denial is common in the moments immediately following rape. Patten was prepared to have Coleo testify on how women react to rape and how such reactions might explain DeLuca's behavior. H. 485-86. Her testimony was not intended to address how RTS might relate to the shooting. He believed such testimony would be outside her area of expertise and his primary concern was an explanation of the syndrome itself. H. 519, 539.

Patten recalled that Ellen Yaroshefsky was involved in a law center at the forefront of women's issues, and had an expertise in the area of Battered Women's Syndrome. H. 511. He does not recall the substance of his discussions with her. She offered to help, and he encouraged her to do so. H. 512. He knew she was offering help on an unpaid basis, but does not recall why she was not retained. H. 513.

5. The Choice of a Defense Strategy

Patten testified that he perceived two possible defenses right up to DeLuca's trial. H. 498. The first was that the government would be unable to prove beyond a reasonable doubt that DeLuca, and not her husband, fired the shots. This strategy was the "who done it?" defense. The other possibility was to go forward with Coleo's testimony, as well as the character witnesses, Mr. DeLuca, and finally, DeLuca herself. He would set up an explanation for DeLuca's conduct and establish a justification defense. They ultimately opted for the "who done it?" defense. H. 498-500.

When the trial began, which defense to pursue was still an open question. H. 501. The decision was made after Judge

Tonetti refused to receive the testimony of Coleo. A colloquy took place around the time the People rested in which Patten realized it was an "uphill struggle" to convince the judge of the value of Coleo's testimony. Patten did not recall the basis of the ruling that Coleo's testimony would not be admitted. H. 496-97.

Nevertheless, informal discussions with the judge in chambers convinced Patten that the government had failed to prove that DeLuca shot Bissett herself. In order to avoid the disruptions of a protest, the judge planned to clear a safe path for DeLuca to exit the building following an acquittal. This conversation, the relaxed atmosphere of the judge's chambers, and the general course of their discussions left Patten with an upbeat sense regarding the likely outcome of the case. H. 545-46.

Patten recalled that the final decision to go with a "who done it" defense was made over lunch, after the Coleo issue had been settled and the government had rested. DeLuca was present, but he could not remember whether GaNun was there as well. H. 496-97. Patten thought that the prosecution had failed to meet its burden of proof. H. 500. He recalled that DeLuca shared his assessment. H. 546-47. They discussed the value of putting on character witnesses without offering any other testimony. Patten felt it was a weak strategy. H. 502. He remembered telling DeLuca that he thought the "who done it?" defense would "fly" because the government had not met its burden. Moreover, he believed that because the trial judge would not let Coleo testify, the other defense might fail. H. 500. Patten testified that the decision not to go forward with a defense was his decision and that DeLuca was in agreement. H. 547.

Patten advised his client "very strongly" not to take the stand. He admitted at the hearing that his opinion was apparently wrong. H. 500. He also testified that he never advised DeLuca that it was her decision whether or not to testify. H. 501. "He was lobbying very heavily in favor of not testifying, and the

decision was made." H. 501. He did not remember telling DeLuca that her character was going to be attacked, but he is fairly certain that he went over the weaknesses in the government's case.[22] H. 543-44, 546. Patten acknowledged that DeLuca "acquiesced" with regard to his advice. H. 501.

Patten's general practice is to advise the client of the available options. Patten testified that he had allowed defendants to testify in the past. "If the client persists [sic] in testifying, then I let them have their way." H. 524. Patten testified that, in the midst of a trial, he is very "strong willed" and very clear as to whether he wants his clients to testify. Many times, clients follow exactly what he recommends. However, he would never forbid his clients from testifying if they chose to reject his advice. H. 524-25.

6. The decision not to pursue an EED defense

Patten testified that he was familiar with the justification, EED, and temporary insanity defenses. H. 504. He explained that his understanding of EED was that a person had not "lost it totally, but [was] under great pressure from their emotions as to certain events that took place around them." H. 505. He suggested that temporary insanity occurs where a person has "lost it, [and does not] know who they are, where they are, what they're doing at the time they're doing it." H. 505.

Patten testified that he and DeLuca discussed EED and whether to go forward with it. He could not recall her reaction to the suggestion of an EED defense, but he was certain that they went over it. H. 505-06. He stated that, "[i]f you look at the New York State statute for murder, right in the statute under Subdivision 1, you * * * have the EED defense written right in

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[22]During the hearing, Patten admitted that he did not recall exactly what he said to DeLuca regarding the decision not to put on a defense. H. 500

there. You cannot discuss the charge in this case * * * without going over [it]." H. 506. He was certain they explored it, but stated "Whether she understood me or not, I don't know." He explained to her that the EED defense reduces a murder charge to manslaughter in the first degree. H. 506.

Patten also testified that he contacted Dr. Schwartz, Chief Forensic Psychiatrist at Kings County Hospital, in part to explore the possibility of an EED defense. H. 429-93, 506-07. He believed that his client's conduct and background were such that psychiatric testimony might be necessary. H. 507. Although Patten did not specifically recall discussing EED with Dr. Schwartz, he testified that he "probably did." H. 507-08.[23]

Patten believed such psychiatric testimony would be helpful in establishing the EED defense and he chose not to pursue the EED defense because DeLuca refused to see a psychiatrist. H. 516-17. DeLuca had "an abhorrence with psychiatrists." H. 516-17. Patten testified that he chose not to pursue justification defense because Judge Tonetti refused to let Coleo testify. H. 517. Although the judge was not advised that Patten wished to admit Coleo's testimony in support of a justification defense, and was only told that it was submitted to cast doubt on testimony by the maid, Patten maintained that he wanted it as a backdrop for DeLucas's testimony. H. 517-18[24]

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[23]Dr. Schwartz's notes of his consultation with Patten were offered at the habeas hearing as petitioner's exhibit 9. They reflect a discussion of two potential defense theories, self-defense and lack of proof beyond a reasonable doubt, but not EED. See H. 508-510.

[24]Petitioner also offered the testimony of Stewart Orden, Esq., as an expert on ineffective assistance of counsel. See H. 553-91. Assuming arguendo, that the court may properly consider such expert testimony on this issue, my determination regarding the merits of the petition would remain in same.

DISCUSSION

I

Ineffective Assistance of Counsel

Under Strickland v. Washington, 466 U.S. 668 (1984), a claim of ineffective assistance of counsel has two components. First, petitioner must show that her attorney's performance was deficient, i.e, that "counsel's representation fell below an objective standard of reasonableness," and that counsel's acts or omissions were "outside the wide range of professionally competent assistance." Id. at 688, 690. Under this analysis, judicial scrutiny of an attorney's performance must be "highly deferential," and the court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689; see also Michel v. State of Louisiana, 350 U.S. 91, 101 (1955). Second, petitioner must show that her attorney's deficient performance prejudiced the defense, i.e., "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. In the context of a challenge to a conviction, petitioner must show "a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." Id. at 695.

The Supreme Court has recognized that "[t]here are countless ways to provide effective assistance in any given case." Id. at 689. Furthermore, "[i]t is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Id.

> A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of

> hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, * * * the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." see Michel v. Louisiana, [350 U.S. 91, 101 (1955)].

Strickland, 466 U.S. at 689; see also United States v. Aquirre, 912 F.2d 555, 560 (2d Cir. 1990); United States v. Nersesian, 824 F.2d 1294, 1321 (2d Cir.), cert. denied, 484 U.S. 957, and cert. denied, 484 U.S. 958 (1987), and cert. denied, 848 U.S. 1061 (1988); Cuevas v. Henderson, 801 F.2d 586, 590 (2d Cir. 1986), cert. denied, 480 U.S. 908 (1987). An attorney has a duty "to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland, 466 U.S. at 691. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgements support the limitations on investigation." Id. at 690-91. The reasonableness of a particular investigative decision will be "substantially influenced by [petitioner's] own statements or actions," since "[c]ounsel's actions are usually based, quite properly, * * * on information supplied by [petitioner]" Id. at 691.

Applying these principles, I find that petitioner has failed to prove that her representation was deficient.

Extreme Emotional Disturbance

Petitioner claims she was denied effective assistance of counsel because counsel never informed her of the existence of

the defense of extreme emotional disturbance or permitted her to decide whether to pursue it at trial. Petition ¶ 12A.[25]

Under New York law, "extreme emotional disturbance for which there was a reasonable explanation or excuse" is an affirmative defense to second-degree murder, the effect of which is to reduce the maximum charge to first degree manslaughter. New York Penal Law § 125.25(1)(a); see Maddox v. Lord, 818 F.2d 1058, 1061 (2d Cir. 1987). Although psychiatric evidence is not legally necessary to establish the defense, People v. Moye, 66 N.Y.2d 887, 890, 498 N.Y.S.2d 767, 769 (1985), it is widely recognized that, as a practical matter, the successful assertion of the defense is difficult, if not impossible, without it. See People v. Harris, 491 N.Y.S.2d 678, 689 (2d Dep't 1985) (psychiatrist's testimony highly probative, "even de rigueur"). Accordingly, it has been held that an attorney's advice as to the practical necessity of psychiatric testimony is not erroneous. See, e.g., Harris, 491 N.Y.S.2d at 689. In light of this practical necessity, an attorney's decision not to pursue the defense may be justified by his client's refusal of psychiatric evaluation. See Fiorenza v. Sullivan, 85 Civ. 0592 (LPG), 1985 WL 6089 (S.D.N.Y. September 3, 1985) (where defendant refused psychiatric evaluation, counsel's failure to pursue possible insanity defense cannot be challenged as unreasonable).

Based upon the evidence presented at the habeas hearing, I find that petitioner has failed to rebut the strong presumption that Patten's determinations with regard to the EED defense

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[25]Although some of petitioner's submissions and certain testimony at the habeas hearing suggest that petitioner believes her attorneys should have presented a justification defense, no claim of ineffective assistance based upon the failure to assert a justification defense has ever been presented to state courts, and any such claim could not be considered by this court without a showing of cause for failure to raise it in petitioner's § 440 motion and actual prejudice. See Grey v. Hoke, 933 F.2d 117, 119 (2d Cir. 1991).

were sound, and I find that counsel's conduct with respect to a possible EED defense was well within the range of reasonable professional assistance. See Strickland, 466 U.S. at 689-90.

I credit Patten's testimony at the habeas hearing that he discussed the EED defense with his client. See H. 505-06. Patten understood that this defense was an integral part of the statute defining the murder charge against his client and stated that "[y]ou cannot discuss the charge in this case * * * without going over [it.]" H. 506. Patten testified that, in his opinion, petitioner's conduct and background were such that psychiatric testimony was likely to be a necessary component of the defense, and that he contacted and spoke to a potential defense expert, Dr. Schwartz, the Chief Forensic Psychiatrist at King's County Hospital. H. 492-93, 506-08, 516. I fully credit Patten's testimony that he ultimately chose not to pursue an EED defense because petitioner had an "absolute aversion to going to psychiatrists" and refused to meet with Dr. Schwartz or, for that matter, any psychiatrist. See H. 516, 521. Indeed, when Patten subsequently canceled the appointment he had made for his client, petitioner said this was "fine, good." H. 73-74.

Patten's recollection of the EED issue is corroborated in significant respects by petitioner's own testimony. Petitioner acknowledged that she and Patten discussed the EED defense and that she told Patten she "wouldn't consent to any type of insanity defense." See H. 72-73, 135-36. In light of petitioner's training and experience as a police officer, her claim that she did not understand the difference between an EED defense and an insanity defense (see H. 72-73, 135-36) is simply incredible. I also find incredible petitioner's claim that she did not know at the time of trial that a successful EED defense would have resulted in a reduced sentence and not an acquittal (H. 157-59), and that she would have chosen to present an EED defense if she had been properly informed by her attorneys. See H. 160-63. I find that she clearly understood the EED option, and

rejected it because of her aversion to psychiatrists, because it would have required her to admit the shooting, and because even if successful, the EED defense would have resulted in a manslaughter conviction.

In sum, I find that petitioner was adequately informed of the availability of an EED defense. In light of petitioner's conceded reluctance to consult a psychiatrist, I further find that Patten could not reasonably be expected to pursue an EED defense, and that he exercised reasonable professional judgment in abandoning that strategy.

Right to Testify

In Rock v. Arkansas, the Supreme Court held that criminal defendants have a constitutional right to testify on their own behalf. Rock v. Arkansas, 483 U.S. 44 (1987).[26] This petition presents issues surrounding the waiver of the constitutional right to testify that have not been decided by the Supreme Court or the Second Circuit.

The first issue concerns whether the constitutional right to testify is "fundamental" in character, and therefore personal to the defendant, or whether it may be waived by defense counsel. In Rock, the Court noted that it has "[o]n numerous occasions * * * proceeded on the premise that the right to testify on one's own behalf in defense to a criminal charge is a fundamental constitutional right" (Rock, 483 U.S. at 53 n.10), and a number of lower courts have explicitly held that the constitutional right to testify in one's defense is "fundamental," and may not be waived by counsel on the defendant's behalf, regardless of the

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[26]The Second Circuit had previously reached this conclusion in United States v. Bifield, 702 F.2d 342, 349 (2d Cir.), cert. denied, 461 U.S. 931 (1983).

soundness of any strategic or tactical considerations.[27] See, e.g., United States v. Teague, 953 F.2d 1525 (11th Cir.) (en banc), cert. denied, ___ U.S. ___, 113 S.Ct. 127 (1992); Rogers-Bey v. Lane, 896 F.2d 279, 283 (7th Cir.), cert. denied, 498 U.S. 831 (1990); United States v. McMeans, 927 F.2d 162, 163 (4th Cir. 1991); United States v. Martinez, 883 F.2d 750, 754-55 (9th Cir. 1989) vacated on other grounds, 928 F.2d 1470 (9th Cir.), cert. denied, ___ U.S. ___, 111 S.Ct. 2886 (1991); United States v. Bernloehr, 833 F.2d 749, 751 (8th Cir. 1987); see also Lema v. U.S., 987 F.2d 48, 52 (1st Cir. 1993) (assuming, without deciding, that constitutional right to testify is "fundamental" and may not be waived by counsel).

The second issue concerns the assertion of a claim of ineffective assistance of counsel based upon a claim that the action or inaction of defense counsel deprived the defendant of the ability to choose voluntarily whether or not to testify in her own behalf. A number of courts have held or assumed that a claim of ineffective assistance of counsel under Strickland is the appropriate vehicle for a claim that the defendant's right to testify was violated by defense counsel. See, e.g., Teague, 953 F.2d at 1534; Rogers-Bey, 896 F.2d at 283; Lema, 987 F.2d at 52; United States v. Vargas, 920 F.2d 167, 169-70 (2d Cir. 1990), cert. denied, ___ U.S. ___, 1112 S.Ct. 93 (1991); but see

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[27]This question has not been explicitly addressed by the Second Circuit. In United States v. Bifield, 702 F.2d 342, 349 (2d Cir.), cert. denied, 461 U.S. 931 (1983), the Second Circuit held that a defendant has a constitutional right to testify in a case that did not present a waiver issue. In United States v. Vargas, 920 F.2d 167, 170 (2d Cir. 1990), cert. denied, ___ U.S. ___, 112 S.Ct. 93 (1991), the court found it unnecessary to reach the issue of waiver, but expressed "substantial doubt" about the correctness of the government's position that the defendant had waived his right to testify by failing to protest to the district judge when his trial counsel rested without calling him as a witness.

Teague, 953 F.2d at 1541 (Clark, J., concurring is part and dissenting in part)(claim of ineffective assistance of counsel is not the appropriate vehicle for analyzing the alleged violation of the right to testify).

In Teague, the court held that "[d]efense counsel bears the primary responsibility for advising the defendant of his right to testify or not to testify, the strategic implications of each choice, and that it is ultimately for the defendant himself to decide." Teague, 953 F.2d at 1533 (footnote omitted). This advice is "crucial," the court held, "because there can be no effective waiver of a fundamental constitutional right unless there is an "intentional relinquishment or abandonment of a known right or privilege'" Id. (adding emphasis and quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)). Accordingly, the court held that

> if defense counsel refused to accept the defendant's decision to testify and would not call him to the stand, counsel would have acted unethically to prevent the defendant from exercising his fundamental constitutional right to testify. Alternatively, if defense counsel never informed the defendant of the right to testify, and that the ultimate decision belongs to the defendant, counsel would have neglected the vital professional responsibility of ensuring that the defendant's right to testify is protected and that any waiver of that right is knowing and voluntary. Under such circumstances, defense counsel has not acted within the range of competence demanded of attorneys in criminal cases, and the defendant clearly has not received reasonably effective assistance of counsel.

Teague, 953 F.2d at 1534 (internal quotations omitted). The court rested its holding in part upon the American Bar Association's Standards for Criminal Justice and the American Bar

Associations' Model Rules of Professional Conduct. Id. at 1533-34. At the same time, however, the court held that "if counsel believes that it would be unwise for the defendant to testify, counsel may, and indeed should advise the client in the strongest possible terms not to testify. The defendant can then make the choice of whether to take the stand with the advice of competent counsel." Id. at 1533 (footnote omitted).

In Teague, the court deferred to specific findings made by the trial court after an evidentiary hearing on defendant's motion for a new trial, and upheld the district court's finding that "the evidence fail[ed] to show that the Defendant's will was 'overborne' by his counsel. The Defendant was advised of his right to testify, was advised that he should not exercise that right, and did not protest." Teague, 953 F.2d at 1534-35. The court also noted counsel's testimony at the evidentiary hearing that "when she rested the defense case, she believed that Teague had assented or acceded to her recommendation" that he not testify. Id. at 1535. Based upon these facts, the court concluded that counsel's performance was not constitutionally deficient. Id.

Relying primarily upon Teague,[28] petitioner claims that she was denied effective assistance of counsel because she was never informed by her attorneys "that she had the final right to decide whether to testify." Petition ¶ 12A

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[28]Petitioner does not cite, and I have not found, any decision on this point by the court of appeals or district courts of the Second Circuit.

Assuming, without deciding,[29] that the right to testify is a fundamental right personal to the defendant, and that the failure to advise a defendant of this right is outside the range of competence demanded of attorneys in criminal cases, I find, based upon the testimony presented at the habeas hearing before me, that petitioner was adequately advised of her right to testify, and ultimately agreed, perhaps reluctantly, with her attorneys' judgment that she should not testify.

Based upon her testimony that she expected to take the stand, it is clear that petitioner knew she had the right to testify; she claims, however, that her attorneys never informed her that she had "the final right to decide whether to testify," i.e. she was never told that she had the right to testify notwithstanding her

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[29]Unlike Teague, this case presents an ineffective assistance claim in the context of a collateral attack on petitioner's conviction. As noted above, the question of whether the refusal of defense counsel to call the defendant to testify gives rise to a viable claim, either independently or as an aspect of an ineffective assistance claim, and under what circumstances, has not been addressed by the Supreme Court or the Second Circuit, and has generated a wide range of diverging views in cases from other circuits. See, e.g., Teague, 953 F.2d at 1535-47 (concurring and dissenting opinions). Accordingly, it appears that if this court were to hold that the failure to advise a defendant that the ultimate decision regarding whether to testify belonged to her is outside its range of competence demanded of attorneys in criminal cased, it would be announcing a new constitutional rule of criminal procedure in violation of Teague v. Lane, 489 U.S. 288 (1989). See Dowell v. C.M. Lensing, 805 F. Supp. 1335, 1360 (M.D.La. 1992), aff'd, 996 F. 2d 306 (5th Cir.), cert. denied, __ S. Ct. __, 1993 WL 418432 (1993); cf. El-Tabech v. Hopkins, 997 F. 2d 386, 389 n.4 (8th Cir. 1993).

attorney's strong recommendation to the contrary.[30] Petition ¶ 12A; H. 142-43, 148-50.

As might be expected, Patten cannot today recall specifically his discussions with petitioner regarding her right to testify, including the lunchtime discussion during which the decision not to present a defense case was made. H. 496-98, 546-47. He testified, however, that it was his general practice to inform his clients of their options and advise them of his opinion, but that he had never made the decision for a client or stood in the way of a client intent on taking the stand. H. 524-25. Petitioner herself conceded that Patten never suggested to her that she would be prevented from taking the stand should she disagree with his advice. H. 170.

Patten candidly acknowledged that he did not explicitly advise petitioner that the "final" decision as to whether to take the stand was hers. H. 501. However the constitution does not require that an attorney use particular words in advising a client of right to testify. As the Supreme Court stated in Strickland, "[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions." Strickland, 466 U.S. at 688-89. "[T]he performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." Id. at 688.

In evaluating counsel's competence in connection with a defendant's right to testify, courts have considered the defen-

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[30]Of course, Patten's recommendation to petitioner not to testify was consistent with his obligation to zealously represent his client. See Teague, 953 F. 2d at 1533.

dant's intelligence, her knowledge of the criminal justice system, her relationship with her attorney and the presence or absence of any protest from the defendant. See, e.g.. Teague, 953 F.2d at 1535 (denying ineffective assistance claim where district court correctly found that "'[d]efendant was advised of his right to testify, was advised he should not exercise that right, and did not protest'"); Galowski v. Murphy, 891 F.2d 629, 636 (7th Cir. 1989) (defendant's allegation that counsel did not inform him of his right to testify, and prevented him from taking the stand, did not establish deprivation of the right to testify where trial court credited defense counsel's testimony that the decision had been mutual, that counsel had informed the court in defendant's presence that defendant would not testify and that it was defense counsel's practice to let clients testify if they so desired), cert. denied, 495 U.S. 921 (1990); United States v. Martinez, 883 F.2d 750, 761 (9th Cir. 1989) (no violation of defendant's right to testify, where defendant would have asked to have testified but counsel advised waiting until the prosection presented its case and then advised defendant not to take the stand, because defendant's education and experience demonstrated that he knew about the right and ultimately did not persist out of respect for his attorney's judgment), vacated on other grounds, 928 F.2d 1470 (9th Cir.), cert. denied, __ U.S. __, 111 S. Ct. 2886 (1991); Siciliano v. Vose, 834 F.2d 29 (1st Cir. 1987) (defendant's decision not to testify, based on the urging of his attorney, did not undermine his right to testify where the court informed the jury that a defendant may choose not to testify, where the record showed that defendant knew he could testify and where there were no allegations that counsel prevented him from exercising his right).

Based upon the many discussions of defense strategy in which petitioner participated, Patten could reasonably have concluded that a more explicit statement regarding petitioner's right to testify was unnecessary--especially in light of his client's fifteen

years of experience as a police officer. See H. 547. Patten reasonably believed that petitioner knew she had the right to take the stand and that she did not protest when he analysis that the prosecution had not met its burden of proof. See H. 546-547.

In any event, even if I believed that petitioner was not aware of her right to decide whether or not to testify, I reject as not credible petitioner's assertion that, had she understood her rights, she would have testified despite Patten's strong recommendation to the contrary. Petitioner was admittedly reluctant to reveal details concerning her sexuality (H. 29, 547-48), and aware that her own testimony would fill the "holes" in the government's case (H. 155-56). In addition, petitioner shared with her attorney, and other observers of the trial, an "upbeat sense" about the verdict, which was reinforced by what the defense perceived to be the judge's view that the prosecution's case had major problems and that a reasonable doubt defense would prevail. See H. 426-28, 545-46. In light of these factors, it is simply inconceivable that petitioner would have insisted on testifying if she had been provided the marginal additional advice that the "final" decision was hers.

In sum, I find that Patten reasonably believed there was a significant likelihood that, if DeLuca testified, her testimony would bolster the prosecution's case and lead the Jury to convict. With these risks in mind, and based upon his experience and judgment, Patten chose to discourage his client from taking the stand and to rely instead on what he reasonably believed would be a better defense strategy. The record demonstrates that petitioner knew she had the right to testify and that she chose not to exercise the right, not because she was unaware that the decision was hers to make, but because she believed that taking the stand was not in her best interest. Accordingly, I find that petitioner has failed to demonstrate that her attorney's performance in this respect fell below accepted standards.

II

Preclusion of Expert Witness on Rape Trauma Syndrome

Petitioner contends that the trial court's refusal to permit the testimony of a defense expert regarding rape trauma syndrome violated her Sixth and Fourteenth Amendment right to present a defense. For the reasons set forth below, I recommend that this claim be rejected.

Petitioner's Application to Present Expert Testimony

After the prosecution rested, Patten requested permission to present the testimony of a defense expert[31] regarding rape trauma syndrome.[32] See T. 886-902. Patten stated that "the law

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[31]The proposed expert is not identified by name in the trial record, but is described as the founder and director of the Rape Counseling Program at St. Vincent's Hospital in Manhattan, who had previously been qualified as an expert witness in cases involving sexual abuse and rape in New York State Supreme Court. T. 858. The expert is identified by name in subsequent legal memoranda as Ms. Flora Colao.

[32]Earlier the same day, Patten had requested that the proposed expert be allowed to remain in the courtroom during the testimony of Ann O'Byrne who was expected to give testimony concerning petitioner's conduct and demeanor at her home after the incident in question. Patten stated his belief that the prosecution would "draw from this witness and argue to the jury certain inferences as to the demeanor and conduct of [his] client which would be encounter to her position that she was raped by the deceased." T. 858-59. Judge Tonetti sustained the prosecutor's objection to petitioner's application, stating "I am going to preclude * * * her * * * from listening to the testimony if she is going to be a witness, and * * * I am not so sure she is ever going to be a witness at all." T. 861. Judge Tonetti indicated that he would make a further ruling with regard to the proposed expert at the appropriate time. T. 861. After O'Byrne testified and the prosecution rested, Judge Tonetti

(continued...)

has for generations had a very, very male view on the concept of rape" that is reflected in the "concept" of "doctrine" of immediate outcry. T. 888. Patten noted, however, that

> over the past eight to ten years we have had instances where the New York City Police Department, the different prosecutor's offices throughout the five counties in New York City have deemed it necessary to, within the Police Department, to form Sex Criminal Analysis Units, Rape Squads. The prosecutor's office itself has deemed it necessary to form special units to handle the prosecution of rape cases.
>
> One of the primary reasons for forming those is the change in the women's movement, the change in the attitudes within law enforcement on the rape victim.

T. 889-90

Patten reminded the court that during the voir dire not one person indicated having "read any book at all in the area of rape, and * * * the common characteristics of a victim of a rape." Patten emphasized that "[w]e have a prejudice." T. 890. "We believed," Patten stated, "and we have seen it here in this courtroom through Det. Taylor, we believe that the has to be an immediate outcry." T. 890. He pointed out that "[q]uestion after question ha[d] been raised by Mr. Schepis [the prosecutor], Did you hear anyone screaming Rape? Did you hear any outcry? Did you hear anything?" T. 890. Patten argued that such an

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[32](...continued)
afforded Patten the opportunity to make a complete record regarding the testimony of thee proposed expert. T. 887.

outcry is "not a fundamental prerequisite. It's a prejudice of ours." T. 890. He went on to describe instances where women had been raped and "where * * * males and the Police Department would say that's not the appropriate reaction, and therefore she wasn't raped." T. 891.

At this point in Patten's presentation, Judge Tonetti questioned "the relevancy of rape to this case." T. 891. Patten responded that rape was relevant because of the prosecution's position "from the very beginning of this case that * * * 'All you individuals know when you are being told a story.'" T. 892. In response, Judge Tonetti stated that he did not quarrel with most of Patten's "dissertation," but stated:

> The theory of the prosecution in this case is based on circumstantial evidence.
>
> * * *
>
> That this defendant had access to the deceased, was last seen with the deceased, left the vicinity of the deceased prior to his demise, and that her gun killed him. That's the theory of the prosecution. It has nothing to do with whether she was raped or had consensual sex. * * * * my question to you is what if she was raped?

T. 892.

Patten then stated:

> It's one of the blocks -- circumstantial evidence which this case is, there's no question about it, there's different pieces, different blocks. One of the pieces if proof [sic], I submit, and the People will probably argue with it because this crazy story makes no sense. She was therefore lying, so this whole business about rape -- so

> it's one bit of evidence to sho[w] she killed the man. That's one of their blocks, their pieces, and they made great way with the testimony of Sgt. Eberhardt who took the only testimony of Mrs. DeLuca before the attorney arrived in the case, and they're making a lot of hullabaloo of whether it was a van or a car, and now because it's the van in his statement that's the key, that's the key of the lie that she's told, that she's told a story to cover over the shooting in the hopes that someone would be sympathetic to her. That's the argument that's going to be made, your Honor.
>
> I submit that the relevance of the rape in this instance, if you have a circumstantial evidence case it's just as likely that there would be a husband who finds out the wife has been raped, and in his own rage goes down and shoots the guy. We are allowed to argue that theory.

T. 892-93. The judge asked Patten, "[w]here is there any evidence of that?" T.893 Patten responded: "There is no evidence. Cross-examination. There's a question for the jury to determine. Is there proof that the People have eliminated every other hypothesis?" T. 894.

Patten continued:

> I'm simply saying they are going to argue, * * * and that's the way the evidence has come in from Murphy and Barrett, that this woman went along on a party. It was in his opening. We say no, she never went along on a party. We say she was abducted.
>
> They say she was with them and because of her driving the car and because of the alleged coming out of the car

> and going into the house and because of allegedly getting out at the hotel, that she could have escaped, that she didn't escape, so therefore that which she told us is a lot of malarkey. That's going to be their position from get-go and it will be part of their pieces of proof.
>
> I submit to you, your Honor, that we have in our minds certain fixed ideas as to how we as men feel women should react.

T. 894.

Judge Tonetti then observed that the proposed testimony "could be offered on the theory that it might have affected the mind or the state of mind of Peter DeLuca." T. 895. However, the judge questioned whether there had been any evidence of this in the case. He stated that "[i]f Peter DeLuca were to testify, that might be a factor. If [DeLuca herself] had testified she had been raped that might be a factor, but to allow an expert to testify about reactions of a rape victim on the theory that maybe that had some effect on someone seems to me to give rise to sheer speculation." T. 895.

Patten concluded his argument by saying:

> Your Honor, if I may, the argument that the People have used, not simply in response to my raising the question, is that the story that she told and the fact that she drive her own car and the fact that they have this claimed rhythmic bouncing in the van, it's all part of their proof, part of their argument that this was a consensual thing, and because there was no outcry, no statement made by her, and I can anticipate an argument she's walking up the hill and here's two fellows at the hydrant. Why didn't she say something to them, I can hear Mr. Schepis

> saying. She passed within two or three feet of them, and that might make sense to this jury, it might.
>
> The question is, does a woman always have to say something to the first man she sees? No. But we all have these ideas, maybe not your Honor, but I don't know about these jurors. They have these ideas and there's going to be an argument on it. Why didn't she say something as she walked by?

T. 895-96.

The prosecutor, ADA Schepis, made three points with regard to the admission of rape trauma syndrome testimony. First, he stated, "I have heard no evidence from anybody that Mrs. DeLuca was raped." T. 896. Judge Tonetti pointed out that he had heard testimony from Sgt. Eberhardt that DeLuca told him that she had been raped. T. 896. Schepis agreed, but stated that he had heard "no direct testimony that Mrs. DeLuca was raped." T. 896.

Schepis also suggested to the court that "there has been no evidence indicating that this was a murder and a justification coming from counsel for the defense, no evidence that I have seen with regard to justification." T. 897. Schepis further argued that even if the court were to find an issue of justification in the case, calling an expert "in effect takes away something that is within the knowledge of the jury. This is not something the jury has no knowledge of such as an area of ballistics or bite marks or anything else. This is an area of common sense that the jury can use their own experience in evaluating." T. 897-98.

Finally, Schepis analogize petitioner's request to attempts to present expert testimony on the subject of the reliability of eye witness identification, which the courts have uniformly rejected because it would result in "taking away an issue from the jury." T. 898-89. Patten replied as follows:

> [I]t's not within the common experience or within the purview of the common experience of the average juror or person to know and be in touch with a person who had been raped. It's not. We have myths about it, Judge. I submit those myths are throughout our community, throughout our society, and not within the purview of everyday experience where someone can use their common sense.
>
> The problem with using common sense is, you're likely to go into the myths as opposed to what actually takes place. My witness has interviewed 5,000 victims of rapes over a period of eight years, and the reactions of common characteristics that go contrary to the myths that we have been living with for all these years, Your Honor.

T. 899-900.

At the conclusion of the presentation, Judge Tonetti reserved decision and the court adjourned for a lunch recess. T. 901a. When the proceedings resumed, counsel and the court conferred at the bench in an off-the-record discussion, and both sides rested in the presence of the jury. T. 902. The record reflects no further discussion of the proposed expert testimony, no request for ruling by defense counsel, and no decision by Judge Tonetti.

Judge Tonnetti's § 330 Decision

As noted above, petitioner's § 330 motion was based in part on her contention that the trial court had erred in precluding expert testimony on rape trauma syndrome.

Judge Tonetti rejected this contention, stating:

> Counsel alluded to a rape from the outset, but there was absolutely no proof whatsoever in the record to substan-

> tiate rape, and even if there were, the Court is of the considered opinion that this testimony of this nature would have been improper in this trial. There was no testimony that the psychologist had ever had occasion to speak to Mrs. DeLuca. There was no testimony concerning Mrs. DeLuca's reactions as to whether or not she had spoken to anybody or not spoken to anybody.
>
> * * * *
>
> I find the whole issue of post rape trauma is a collateral one, has no merit whatsoever.

A. 467.

Procedural Default

Respondent contends that petitioner abandoned her request to present the proposed expert testimony, and that "the decision not to call the expert was part of a specifically avowed defense strategy." Resp. Aff., Ex. 9 (respondent's October 1990 memo of law) at 20-21 and n. 7. Respondent therefore argues that this court should not consider petitioner's claim. Id. at 20.

As noted above, petitioner raised the preclusion of expert testimony on rape trauma in her § 330 motion to set aside the verdict, on direct appeal, and in her § 440 motion. On direct appeal, the People argued that petitioner had abandoned her request as a matter of trial strategy. See Resp. Aff., Ex. 2 (respondent's brief on direct appeal) at 53. At the hearing on the § 440 motion, petitioner advised the judge of the dispute regarding whether the court had ruled on petitioner's request to call a rape trauma expert. Judge Tonetti stated that:

> my recollection is that * * * the court made a ruling denying counsel's application to call that witness and that it was preserved for the record.

A. 222 at 3-4. Judge Tonetti noted, however, that his ruling may have been given off the record. A. 222 at 4. Petitioner also points out that in the prosecution's May 18, 1984 affirmation in opposition to her § 330 motion, ADA Schepis refers to "the Court's refusal to permit a defense expert to testify," and concludes that "[f]or this reason and for the other reasons the court stated in its decision refusing to permit the testimony of this witness, * * * the defendant's claim * * * should be denied." Resp. Aff., Ex. 3 at 14 (petitioner's reply brief on direct appeal). Although this statement was probably made without the benefit of the trial transcript, it is highly unlikely that the prosecutor would have forgotten the complete abandonment of such an extensively argued application. Based upon the prosecutor's recollection, within weeks of the trial, that Judge Tonetti had denied petitioner's application, and the judge's recollection that he had denied the application, and that his ruling may well have been made off the record, I recommend that the court reject respondent's assertion of a procedural default.

Right to Present a Defense

It is well-established that the right to present a defense is one of the "minimum essentials of a fair trial," which derives from the Sixth Amendment compulsory process clause and the due process clause of the fourteenth amendment. Chambers v. Mississippi, 410 U.S. 284, 294 (1973); Washington v. State of Texas, 388 U.S. 14 (1967); Rosario v. Kuhlman, 839 F.2d 918, 924 (2d Cir. 1988). At the same time, however, the accused, in exercising his right to present a defense, "must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." Chambers v. Mississippi, 410 U.S. at 284, 302; see also Rock v. Arkansas, 483 U.S. 44, 55 n.11 (1987)

("[n]umerous state procedural and evidentiary rules control the presentation of evidence and do not offend the defendant's right to testify").

Moreover, even if erroneous, evidentiary rulings by state courts "do not automatically rise to the level of constitutional error sufficient to warrant issuance of a writ of habeas corpus." Taylor v. Curry, 708 F.2d 886, 891 (2d Cir.), cert. denied, 464 U.S. 1000 (1983). A defendant is entitled to habeas relief only where he can show that the error was so prejudicial as to amount to a denial of due process and/or deprived him of a "fundamentally fair trial." Taylor v. Curry, 708 F.2d at 891 (emphasis in original; citations omitted); Rosario, 839 F.2d at 925.[33] "It is the materiality of the excluded evidence to the presentation of the defense that determines whether a defendant had been deprived of a fundamentally fair trial." Rosario, 839 F.2d at 925 (citing Taylor v. Curry). Erroneously excluded evidence is material, and constitutional error has been committed, "'if the omitted evidence creates a reasonable doubt that did not otherwise exist'." Rosario, 839 F.2d at 925, quoting United States v. Agurs, 427 U.S. 97, 112-13 (1976) (emphasis omitted).

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[33]See also Lisenba v. People of the State of California, 314 U.S. 219, 228-229 (1941); United States ex rel. Foster v. DeRobertis, 741 F.2d 1007, 1014-15 (7th Cir. 1984), cert. denied, 469 U.S. 1193 (1985); United States ex rel. DiGiacomo v. Franzen, 680 F.2d 515, 517 (7th Cir. 1982); Nettles v. Wainwright, 677 F.2d 410, 414-15 (5th Cir. 1982); Gilmore v. Curry, 523 F. Supp. 1205, 1208 (S.D.N.Y. 1981); Bell v. State of New York, 506 F. Supp. 590, 594 (S.D.N.Y.), aff'd 659 F.2d 1057 (2d Cir. 1981); Forman v. Smith, 482 F. Supp. 941, 952 (W.D.N.Y. 1979); Mitchell v. Smith, 481 F. Supp. 22, 25 (E.D.N.Y. 1979), aff'd, 633 F.2d 1009 (2d Cir. 1980), cert. denied, 449 U.S. 1088 (1981); Reese v. Bara, 479 F. Supp. 651, 656 (S.D.N.Y. 1979); Orr v. Schaeffer, 460 F. Supp. 964, 966 (S.D.N.Y. 1978).

Finally, the habeas court must determine whether an error of constitutional dimension was harmless.[34] Rosario, 839 F.2d at 924. In Brecht v. Abrahamson, -- U.S. --, 113 S.Ct. 1710 (1993), the Supreme Court held that the appropriate standard for harmless error in a habeas proceeding is "whether the error 'had substantial and injurious effect or influence in determining the jury's verdict.'" Id. at 1714, 1722 (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946).[35] According to the Brecht court, habeas petitioners "are not entitled to habeas relief based on trial error unless they can establish that it resulted in actual prejudice." Id. at 1722 (quotations omitted); see also Washington v. James, 996 F.2d 1442, 1445 n.1 (2d Cir. 1993); Levy v. Abate, 93 Civ. 0258 (JSM), 1993 WL 267421 *2 (S.D.N.Y. July 9, 1993).

Discussion

Based upon his remarks at trial and his decisions on petitioner's § 330 and § 440 motions, it appears that Judge Tonetti excluded the proposed testimony because it was collateral and of questionable probative value. Assuming, arguendo, that Judge Tonetti erred in precluding the testimony of the rape trauma expert,[36] I find that the error was not of constitutional

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[34]It is not clear whether or to what extent the standard for determining whether an erroneous evidentiary ruling is of "constitutional dimension" (materiality) differs from the standard for harmless error (actual prejudice).

[35]The court in Rosario v. Kuhlman had indicated that the test was whether the constitutional error "was harmless beyond a reasonable doubt." Id. at 924.

[36]A trial judge has broad discretion in determining the relevancy and admissibility of evidence. Levy v. Abate, 93 Civ. 0258 (JSM), 1993 WL

(continued...)

dimension. Alternatively, I find that if Judge Tonetti committed constitutional error, it was harmless.

In Fennell v. Goolsby, 630 F. Supp. 451 (E.D.Pa. 1985), a habeas petitioner who had been convicted of voluntary manslaughter, claimed that the trial court's refusal to allow her to present a battered woman syndrome expert violated her Sixth and Fourteenth Amendment rights. Petitioner argued that the testimony was offered to corroborate her testimony and to support her insanity and self-defense claims (though the district court found that a proper foundation had only been laid as to the credibility argument).

The court found that the trial court's refusal to allow the expert to testify was not a constitutional violation, stating that

> [w]here the proposed evidence is not critical factual testimony but expert testimony offered for only the very limited purpose of supporting credibility, the trial court's failure to admit such testimony did not deny defendant her Sixth Amendment right to present witnesses in her defense.

Id. at 461. The court further held that even if the refusal to permit the testimony was constitutional error, it was harmless because there was already significant evidence in the record of abuse upon which the jury could draw its own inferences, and

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[36](...continued)
267421 (S.D.N.Y. July 9, 1993); People v. Cronin, 60 N.Y.2d 430, 433, 470 N.Y.S.2d 110, 111 (1983) ("The admissibility and bounds of expert testimony are addressed primarily to the sound discretion of the trial court"). Because, in the absence of a justification defense, the question of whether or not petitioner was raped was collateral, I believe that Judge Tonetti did not abuse his discretion in excluding the proposed testimony.

that two psychiatrists had testified regarding the petitioner's mental capacity.

In Tourlakis v. Morris, 738 F. Supp. 1128 (S.D.Oh. 1990), the court similarly held that he exclusion of expert testimony on battered woman syndrome was not constitutional error. In that case, the petitioner, who had been convicted of attempted murder, proposed to present expert testimony to support her claim of self-defense. The court rejected petitioner's claim, stating:

> The testimony excluded was not that of a key fact witness who actually observed the crime. Rather, petitioner's state of mind, and, presumably, on the ultimate issue of whether petitioner perceived she was in immediate danger at the time of the shooting. The Constitution does not require that such testimony be admitted.

Id. at 1140. The court further held that even if the exclusion of expert testimony was constitutional error, it was harmless because the fact-finder was not denied testimony of integral facts, but rather an expert's interpretation of those facts.

In this case, petitioner sought to present expert testimony regarding a collateral issue--the truth of falsity of her claim that she had been raped. Moreover, as in Tourlakis and Fennel, petitioner's proposed expert had no personal knowledge of the facts surrounding the murder, but could provide only an interpretation of those facts. In order to violate the Sixth Amendment, the omitted evidence must "create[] a reasonable doubt that did not otherwise exist." Rosario, 839 F.2d at 925. Even if, based upon the expert testimony proffered by petitioner, the jury might be more inclined to believe that petitioner had been raped, the facts pertaining to the gun and petitioner's access to the deceased remained unchallenged. Accordingly, in the

absence of a justification defense,[37] the fact that petitioner may have been raped created no reasonable doubt that did not otherwise exist. For the same reasons, any error in excluding the expert's testimony did not have a "substantial and injurious effect or influence" on the jury's verdict. Brecht. 113 S.Ct. at 1714, 1722.

CONCLUSION

For the reasons set forth above, I recommend that the petition be denied.

Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties shall have ten (10) days from receipt of this Report to file written objections. See also Fed. R. Civ. P. 6. Such objections shall be filed with the Clerk of the Court, with extra copies delivered to the chambers of the Honorable Robert J. Ward, Room 2204, and to the chambers of the undersigned, Room 631. Any requests for an extension of time for filing objections may be directed to Judge Ward. Failure to file objections may result in a waiver of those objections for proposes of appeal. Thomas v. Arn, 474 U.S. 140 (1985); Wesolek v. Canadair Ltd., 838 F.2d 55, 57-59 (2d Cir. 1988); McCarthy v. Manson, 714 F.2d 234, 237-38 (2d Cir. 1983).

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[37]It should be pointed out that petitioner's counsel at no time suggested to Judge Tonetti that the expert's testimony would be part of a justification defense, or that petitioner herself would testify that she committed what she believed to be justifiable homicide.

DATED: New York, New York
December 21, 1993

Respectfully submitted,

/s/ Kathleen A. Roberts
KATHLEEN A. ROBERTS
UNITED STATES MAGISTRATE
JUDGE

APPENDIX D

Appendix D

Order of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE III
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the twenty-eighth day of March on thousand nine hundred and ninety-six.

DeLuca,

Petitioner-Appellee,

v

Dkt No: 94-2418

Lord,

Respondent-Appellant.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by the appellant Elaine A. Lord.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

GEORGE LANGE III, Clerk

By: /s/ Beth J. Meador
Beth J. Meador,
Administrative Attorney